FEDERAL COURT OF AUSTRALIA

Staatz v Berry, in the matter of Wollumbin Horizons Pty Ltd (in liq) (No 3)

[2019] FCA 924

File number:	QUD 32 of 2018
Judge:	**DERRINGTON J**
Date of judgment:	20 June 2019
Catchwords:	**CORPORATIONS** – liquidation – court orders or directions in winding up as to manner in which trust property is to be applied – company holding land on constructive trust **TRUSTS** – constructive trusts – company promoted scheme to establish commune – subscribers to have beneficial interest in land by unit in unit trust – unit trust fails and commune fails – directions as to beneficial interest in land – more subscribers in value than value in land **CORPORATIONS** – winding up – costs expenses and remuneration of liquidator of corporate trustee where trust not sole activity of company – where limited right of indemnity
Legislation:	*Corporations Act 2001* (Cth) *Federal Court of Australia Act 1976* (Cth) *Trustee Act 1925* (NSW) *Federal Court Rules 2011* (Cth)
Cases cited:	*13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377 *Australian Securities and Investments Commission v Letten (No 17)* (2011) 286 ALR 346 *Bannister v Bannister* [1948] 2 All ER 133 *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 *Baumgartner v Baumgartner* (1987) 164 CLR 137 *Bennett v Horgan* (unreported, Supreme Court of New South Wales, Bryson J, 4056 of 1991, 3 June 1994) *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211 *Black Uhlans Incorporated v Crime Commission* [2002]

NSWSC 1060

Bloch v Bloch (1981) 180 CLR 390

Boyce v Boyce (1849) 16 Sim 476

Brown v Heffer (1967) 116 CLR 344

Bryson v Bryant (1992) 29 NSWLR 188

Burgess v Rawnsley [1975] Ch 429

Calverley v Green (1984) 155 CLR 242

Carson v Wood (1994) 34 NSWLR 9

Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth [2019] HCA 20

Central Trust and Safe Deposit Co v Snider [1916] 1 AC 266

CGU Insurance Limited v One.Tel Limited (In Liquidation) (2010) 242 CLR 174

Dean v Aylward [2017] NSWSC 972

Drake v Whipp [1996] 1 FLR 826

Dyer v Dyer (1788) 30 ER 42 (Ch)

Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89

Foskett v McKeown [1998] Ch 265

Foskett v McKeown [2001] 1 AC 102

Giumelli v Giumelli (1999) 196 CLR 101

Goodfriend v Goodfriend [1972] SCR 640

Halloran v Minister Administering National Parks and Wildlife Act 1974 (2006) 229 CLR 545

Helou v Nguyen [2014] NSWSC 22

Howard v Miller [1915] AC 318

Imam Ali Islamic Centre v Imam Ali Islamic Centre [2018] VSC 413

John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd (2010) 241 CLR 1

Jones (Liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil & Concrete Contractors Pty Ltd (in liq) (2018) 354 ALR 436

Jones v Kernott [2010] 1 WLR 2401

Korda v Australian Executor Trustees (SA) Ltd (2015) 255 CLR 62

Krejci (liquidator), in the matter of Community Work Pty Ltd (in liq) [2018] FCA 425

Lane (trustee), in the matter of Lee (bankrupt) v Deputy Commissioner of Taxation [2017] 253 FCR 46

Legal Services Board v Gillespie-Jones (2013) 249 CLR 493

	Lucas v Lucas [2018] NSWSC 962 *Macedonian Orthodox Community Church v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese* (2008) 237 CLR 66 *Munro v Munro* [2018] VSC 747 *Muschinski v Dodds* (1985) 160 CLR 583 *Oughtred v Inland Revenue Commissioners* [1960] AC 206; [1958] Ch 383 *Papas v Co* [2018] NSWSC 1404 *Re Amerind Pty Ltd; Commonwealth v Byrnes and Hewitt* (2018) 54 VR 230 *Re Berkeley Applegate (Investment Consultants) Ltd (in liq)* [1989] Ch 32 *Re Hallett's Estate; Knatchbull v Hallett* (1879) 13 Ch D 696 *Re Mackie Group Pty Ltd (in liq)* (2017) 122 ACSR 537 *Re Universal Distributing Co (in liq)* (1933) 48 CLR 171 *RWG Management Ltd v Commissioner for Corporate Affairs (Vic)* [1984] VR 385 *Scott v Scott* (1963) 109 CLR 649 *Shalson v Russo* [2005] Ch 281 *Silvia (Trustee) v Williams, in the matter of Williams (Bankrupt)* [2018] FCA 189 *Sivritas v Sivritas* [2008] VSC 374 *Smith, in the matter of Buddy Management Pty Ltd (in liq) v Buddy Management Pty Ltd (in liq)* [2019] FCA 566 *Stack v Dowden* [2007] 2 AC 432 *Stavrianakos v Western Australia* [2016] WASC 64 *Widmer v Imagination Enterprises Pty Ltd* (unreported, Supreme Court of Western Australia, Bredmeyer M, CIV 1126 of 1999, 9 April 1999) *Woodgate, in the matter of Bell Hire Services Pty Ltd (in liq)* [2016] FCA 1583 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484
Date of hearing:	3 December 2018, 4 December 2018, 5 December 2018 and 25 February 2019
Registry:	Queensland
Division:	General Division
National Practice Area:	Commercial and Corporations

Sub-area:	Corporations and Corporate Insolvency
Category:	Catchwords
Number of paragraphs:	225
Counsel for the Plaintiff:	Mr C Jennings
Solicitor for the Plaintiff:	Patane Lawyers
Counsel for the First Defendant:	The first defendant appeared in person
Counsel for the Second Defendant:	The second defendant did not appear
Counsel for the Third, Fourth, Fifth and Sixth Defendants:	Mr JM Manner
Solicitor for the Third, Fourth, Fifth and Sixth Defendants:	Mark Swivel Legal
Counsel for the Seventh Defendant:	The seventh defendant appeared in person
Counsel for the Eighth Defendant:	The eighth defendant appeared in person
Counsel for the Ninth Defendant:	The ninth defendant appeared in person

ORDERS

QUD 32 of 2018

IN THE MATTER OF WOLLUMBIN HORIZONS PTY LTD (IN LIQUIDATION) ACN 606 581 364

BETWEEN:	**STEVEN NEVILLE STAATZ AS LIQUIDATOR OF WOLLUMBIN HORIZONS PTY LTD (IN LIQUIDATION) ACN 606 581 364** Plaintiff
AND:	**RON BERRY** First Defendant
	GILLIAN NORMAN Second Defendant
	EMANUELE AGUS (and others named in the Schedule) Third Defendant

JUDGE: **DERRINGTON J**

DATE OF ORDER: **20 JUNE 2019**

THE COURT ORDERS THAT:

1. The plaintiff is justified in treating the deed of trust dated 23 June 2015 between Peter Hetherington, as settlor, and Wollumbin Horizons Pty Ltd (the Company), as trustee, as ineffective and the trust purportedly established thereby as invalid.
2. The plaintiff is justified in treating real property situated at 3222 Kyogle Road, Mount Burrell in New South Wales, being Lot 20 in Deposited Plan 755714A and 755714B and Lot 2 in Deposited Plan 1148316 (being all the land in folio identifiers 20/755714A, 20/755714B and 2/1148316) (the Property) as being held by the Company, as bare trustee, subject to any charge or lien that the Company has over the Property to secure payment of any debts properly incurred by the Company as trustee, pursuant to a constructive trust (the Trust) for those parties who subscribed money for the purposes of becoming members of the Bhula Bhula Community.
3. The plaintiff is justified in treating the beneficiaries of the Trust as those persons whom the plaintiff identifies as having subscribed to become members of the Bhula Bhula Community where the funds so subscribed were or were intended to be used by

the subscriber in relation to the costs of acquisition of the Property, the purchase price of the Property, the discharge of the mortgage over the Property, or for the maintenance or improvement of the Property, in proportions calculated rateably to the amount of money they each contributed to the total funds subscribed for those purposes.

4. The plaintiff is justified in proceeding to market for sale and selling the Property in the way he considers appropriate.

5. The plaintiff is appointed receiver, without security, over the Property, pursuant to s 57 of the *Federal Court of Australia Act 1976* (Cth).

6. The plaintiff be so appointed with the powers provided by s 420 of the *Corporations Act 2001* (Cth) as if the reference therein to "the corporation" were to "the Trust" together with the powers that a liquidator has in respect of property of a company (in its role as legal owner and trustee) pursuant to s 477 of that Act.

7. The need for the plaintiff, as receiver, to file a guarantee under rr 14.21 and 14.22 of the *Federal Court Rules 2011* (Cth) is dispensed with.

8. Pursuant to s 74MA of the *Real Property Act 1900* (NSW), Melissa Hirsch, within 14 days of the date of this order, withdraw the caveat (dealing number AM352133M) from the title of the Property.

9. It is declared that the Company has a right of indemnity from the assets of the Trust for Trust debts, being those debts properly incurred as trustee of a constructive trust.

10. The plaintiff is justified in calling for proofs of Trust debts of the Company, being those debts properly incurred as a trustee of a constructive trust, and to have recourse to the assets of the Trust to satisfy those claims, as accepted.

11. The plaintiff is justified in recovering the costs and expenses incurred by the Company and the plaintiff in realising the assets of the Trust, and otherwise dealing with the Trust, from the assets of the Trust.

12. The plaintiff, in his capacity as administrator and liquidator of the Company and as receiver of the Property, is entitled to be paid from the proceeds of the sale of the Property:

    (a) his costs, expenses and remuneration to the extent to which they relate to work undertaken by the plaintiff in relation to the administration of the Trust including the work undertaken to render the Company's right of exoneration

available to meet the claims of the Company's creditors whose debts were incurred in the administration of the trust;

(b) an amount in respect of his costs, expenses and remuneration relating to general insolvency matters, to the extent the costs, expenses and remuneration concern the administration of the Trust.

13. It is declared that the plaintiff is entitled to a lien over the assets of the Trust in respect of his fees, expenses, and outlays incurred in his capacity as administrator and, subsequently, as liquidator of the Company to the extent allowed by the Court.

14. The plaintiff's costs of the proceeding (including reserved costs), calculated on a full indemnity basis, be paid out of the assets of the Trust and, to the extent not satisfied from the assets of the Trust, be costs in the liquidation.

15. It is declared that the plaintiff has a lien over the assets of the Trust for his costs of these proceedings.

16. The third, fourth, fifth and sixth defendants' costs of the proceeding (including reserved costs), calculated on a full indemnity basis, be paid out of the assets of the Trust.

17. Liberty to apply.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DERRINGTON J:

Introduction

1 The liquidator of Wollumbin Horizons Pty Ltd (the Company), Mr Steven Staatz, seeks the Court's guidance and certain orders in relation to the winding up of the Company and land which it holds in northern New South Wales, just south of the Queensland border.

2 The matter before the Court has numerous difficulties. First, the Company had very poor and limited record keeping and acted by or through solicitors with, apparently, equally poor attention to detail. The Company's operations as a purported trustee were often legally misconceived and it engaged in activities in disregard or ignorance of the legal rights and obligations between it and others, including persons who depended on it. These create significant impediments to reconstructing the events relevant to these proceedings and giving sensible legal characterisation to the consequences of persistent random and casual conduct. Secondly, a number of the defendants were without legal representation. Whilst some of those respondents admirably tried their best to focus on the matters relevant to the issues to be decided, a number were distracted by extraneous concerns and were inclined to air their actual or perceived grievances against the promoters of the Company, the liquidator, and other defendants. Thirdly, and consequentially upon the lack of representation, much of the evidence sought to be advanced was inadmissible or irrelevant to the matters arising for determination. That said, the material presented by the liquidator was admitted without relevant objection and the evidential facts on which the matter rests were not greatly disputed.

3 In brief terms this case concerns the activities of Mr Mark Darwin and his associates who promoted a scheme for the establishment of a form of commune called the "Bhula Bhula Community" or the "Bhula Bhula Community Village" on land in northern New South Wales. All members were to contribute to the cost of its establishment, acquisition and operation. Apparently, this form of co-habitation on a single parcel of land is not uncommon in the north-eastern parts of that State. The persons intending to participate in the Community were told that, by reason of their financial contributions to the scheme, they would acquire an interest in the land on which it was to be situated, and that it was a place where they were each entitled to establish a residence. The initial subscribers were also told

that the funds which they paid would be held on trust pending the purchase of the land and other related matters. A substantial amount of money was amassed by Mr Darwin, the Company was incorporated, and it purchased the land in its name. Some of the funds received from early subscribers were used to purchase the land. Borrowed funds were also used and a mortgage over the land was granted to the lender to secure repayment. Subsequently, additional persons were induced to become members of the Community by subscribing money on the faith of securing a right to reside in the commune and acquiring an interest in the land. Some of the funds advanced by those persons were used to discharge the mortgage. Following that, further persons were likewise induced to pay money for the right to be part of the Community and to acquire an interest in the land. By that time, however, the purchase price of the land and the mortgage debt had been fully discharged.

4 It is important to keep in mind that each person who became a Community member did so on the understanding that others who paid their subscriptions and who became members would also have an interest in the Community land. That was so regardless of whether they were initial subscribers whose money was used to pay the purchase price, or whose subscribed money was used to pay the mortgage, or whose money was received after the acquisition of the land and was intended to be used to maintain and improve the land. There was, in effect, a quasi-domestic, joint endeavour or enterprise pursuant to which the Community would be established, maintained and operated with each member having ownership of the land on which it was situated. Perhaps one characteristic which sets this case apart from others is that the membership of the joint endeavour expanded over time and all whom now claim an interest in the land on which the Community was established were not original members of the Community whose money was paid towards the acquisition of the land.

5 Mr Darwin, and others involved in the promotion of the Community, informed potential Community members they would have an interest in the land by way of a unit in a unit trust of which a company would be trustee. Although some steps were taken to establish the unit trust, which was to underpin the operations of the Community, no valid unit trust to which the land was subject was effected. The proposed commune failed, not in the least because the local town planning approvals required for multiple dwellings to be erected on the land had not been obtained. The Company incurred substantial debts and became insolvent. In the present proceedings, the liquidator seeks the Court's guidance as to the manner in which the Company holds the title to the land and how, in respect of the land, the Company's liquidation is to proceed.

6 The defendants to the proceedings are a number of the erstwhile Community members who claim to have a beneficial interest in the land on which the Community was sited. The basis of some of the claims is that the company holds the land on a resulting trust for those members who subscribed money for its purchase, as it was not intended that the Company itself have any beneficial interest in the land. Whilst it is possible to identify with some precision that money paid by some of the subscribers was used to meet the purchase price of the land, there was insufficient detail in the evidence available to permit identification of the precise entitlements of all parties. In other words, tracing the funds of all subscribers into the purchase price is a difficult, if not impossible, task. Additionally, whilst the land might also be said to be held on a constructive trust, the evidence does not permit the Court to ascertain the identity of all persons who might be beneficiaries under that trust.

7 It is therefore necessary to deliver these reasons which determine the legal and equitable rights of the various groups, and the liquidator should then be able to ascertain the individual entitlements. If there is uncertainty, the liquidator can approach the Court for additional directions.

8 The third, fourth, fifth and sixth defendants were represented by Mr Manner of Counsel. The other five defendants had no representation. Some of those raised a wide range of grievances, many of which were not relevant to the issues under consideration. In particular, the second defendant has persisted in raising irrelevant and scandalous matters. Prior to the hearing of final submissions in open court on 25 February 2019, she emailed a copy of her 'Closing Statement', however she did not file that document or attend the hearing. The document traverses many matters, none of which are of assistance to the Court in resolving the proceeding. In any event, she refers in that document to her "intention not to participate further" in the proceeding. The document reflects one of the many ways her actions have increased the costs of the liquidation and this litigation, and thereby reduced any potential return to her and the other subscribers and creditors. If such conduct continues, it will no doubt further erode funds to be realised by the sale of the land. That said, amongst the arguments advanced by the other litigants in person, some perspicacious observations were made.

Jurisdiction to decide the matter

9 The liquidator relies on the power of the Court under s 90-15 (or s 45-1) of Schedule 2 of the *Corporations Act 2001* (Cth) or under ss 63 and 93 of the *Trustee Act 1925* (NSW) for the

making of orders or directions in relation to the trust, at least in so far as it concerns the winding up of the Company. He also seeks orders appointing him the receiver of the assets of the trust to facilitate his carrying out of the Court's orders. The power of the Court to make such orders arises under s 57 of the *Federal Court of Australia Act 1976* (Cth) and r 14.21 of the *Federal Court Rules 2011* (Cth).

10 The power under the *Corporations Act* can be utilised where a company is under external administration: s 90-15(1); and a company is taken to be under external administration when, *inter alia*, a liquidator has been appointed: s 5-15. Section 90-15 confers broad powers on the Court to make "such orders as it thinks fit in relation to the external administration of a company". The examples given in s 90-15(3) include determining any question arising in the external administration of the company. In *Krejci (liquidator), in the matter of Community Work Pty Ltd (in liq)* [2018] FCA 425, Gleeson J observed in relation to the scope of the power:

> 46 The principles applicable to the exercise of the Court's power under s 90-15 of the Insolvency Practice Schedule are, in effect, the same as those that applied to the exercise of the Court's power under ss 479(3) and 511 of the Act: *Walley, in the matter of Poles & Underground Pty Ltd* [2017] FCA 486 at [41]; *Re Glengrant Civil Pty Ltd (in liq)* [2017] NSWSC 843 at [11] *and Re Octaviar Administration Pty Ltd (in liq)* [2017] NSWSC 1556 ("*Re Octaviar*") at [5].
>
> 47 The relevant principles were recently set out by Black J in *Re Octaviar*, where his Honour observed as follows:
>
> > [7] I summarised the scope of the Court's power to give directions under s 479(3) of the *Corporations Act* in *Re MF Global Australia Ltd (in liq)* (2012) NSWSC 994; (2012) 267 FLR 27 at [7] as follows:
> >
> > > Section 479(3) of the *Corporations Act* allows a liquidator to apply to the court for directions in relation to a matter arising under a winding up. The function of a liquidator's application for directions under this section is to give the liquidator advice as to the proper course of action for him or her to take in the liquidation: *Sanderson v Classic Car Insurances Pty Ltd* (1985) 10 ACLR 115 at 117; (1986) 4 ACLC 114; *Re Ansett Australia Ltd (admins apptd) and Korda* [2002] FCA 90; (2002) 115 FCR 409; 40 ACSR 433 at [46]. The court may give directions that provide guidance on matters of law and the reasonableness of a contemplated exercise of discretion but will typically not do so where a matter relates to the making and implementation of a business or commercial decision, where no particular legal issue is raised and there is no attack on the propriety or reasonableness of the decision: *Sanderson v Classic Car Insurances Pty Ltd* above at 117; *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 at 686-7; 5 ACSR 673; 9

> ACLC 1291; *Re Ansett Australia Ltd* above at [65]; *Re One.Tel Networks Holdings Pty Ltd* [2001] NSWSC 1065; (2001) 40 ACSR 83 at (32].

[8] I also referred to the scope of the Court's powers under s 511 of the *Corporations Act* in that decision and observed (at (8)) that:

> Section 511 of the *Corporations Act* provides an alternative source of power to give such a direction and the Liquidators also rely on that section. The principles applicable to an application under that section were recently reviewed by Ward J in *Re Purchas* [2011] NSWSC 91 ... Applications made under this section in a voluntary winding up are determined in a similar manner to applications in a court ordered winding up under s 479(3) of the *Corporations Act* notwithstanding that section does not expressly require that it be 'just and beneficial' to give the relevant direction. The court may give such a direction where it will be 'of advantage in the liquidation': *Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd* (1997) 42 NSWLR 209 at 212; *Handberg v MIG Property Services Pty Ltd* (2010) 79 ACSR 373 at [7]. The effect of a determination under the section is to sanction a course of conduct on the part of the liquidator so that he or she may adopt that course free from the risk of personal liability for breach of duty: *Handberg v MIG Property Services Pty Ltd* at [7].

[9] I also recognise that the Court's powers to give judicial advice and give directions under these sections are intended to facilitate the performance of a liquidator's functions and should be interpreted widely to give effect to that intention, and the Court may give such advice or give such a direction where it is advantageous to the liquidation to do so: *Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd* (1997) 42 NSWLR 209 at 212; *Handberg v MIG Property Services Pty Ltd* [2010] VSC 336; (2010) 79 ACSR 373 at [7]; *Re One.Tel Networks Holdings Pty Ltd* [2001] NSWSC 1065; (2001) 40 ACSR 83; *Re One. Tel Ltd* [2014] NSWSC 457; (2014) 99 ACSR 247 at [32]; *Re Octaviar Ltd (in liq) and Octaviar Administration Pty Ltd (in liq)* [2017] NSWSC 1005.

11 However, subsequently in *Smith, in the matter of Buddy Management Pty Ltd (in liq) v Buddy Management Pty Ltd (in liq)* [2019] FCA 566, her Honour also accepted that the power in s 90-15 was wider than that which exists under s 479(3) and s 511 of the *Corporations Act*. Her Honour said (at [40]):

> 40 As Gleeson JA noted in *In the matter of Hawden Property Group Pty Ltd (in liq)* [2018] NSWSC 481; (2018) 125 ACSR 355 at [8], the power under s 90-15 is expressed in terms wider than the power under the former s 479(3) and accommodates the determination of substantive rights. Gleeson JA noted that the Court would not do so without affording potentially affected parties an opportunity to be heard, following the approach formerly taken in considering the exercise of s 479(3).

12 It was not suggested by any party that the powers in Sch 2 were not sufficient to empower the Court to determine the questions raised by the liquidator. The absence of any such suggestion was justified and the issues raised by the liquidator fall comfortably within the scope of s 90-15. It is just and beneficial or advantageous to the winding up to proceed under that section because the question raised is pivotal to the conduct of the winding up and because the question is largely one of law founded upon relatively uncontentious evidence. Whilst the courts expect liquidators to exercise their professional skill and judgment in relation to the appropriate steps to be taken in a liquidation here, where the liquidator is confronted with allegations made by several persons who have not received legal advice, the seeking of the protection afforded by the Court's advice is warranted. Further, the procedure is a cost effective one in circumstances where the assets which are the subject of the dispute are relatively small.

13 The liquidator also relied upon the power of the court in s 63 of the *Trustee Act*, which permits a trustee to apply to the court for an opinion, advice or direction on any question concerning the management or administration of trust property. In *Macedonian Orthodox Community Church v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese* (2008) 237 CLR 66, [54]-[75] the High Court recognised that the power under that section is appropriately exercised for the resolution of legitimate doubts held by the trustee as to the proper course of action.

14 The liquidator has given notice to all persons who might be interested in the outcome of the litigation. That said, during the course of the hearing certain documents were produced pursuant to a subpoena. Those documents disclosed the existence of a number of persons who paid $500 each to Mr Darwin or at his direction. At best, those persons would be minor creditors of the Company and, to date, they have taken no interest in the liquidation. That is not a criticism but merely a reflection of the limited quantum of their potential claims. In addition, the actual identity of those persons is uncertain and it is likely that it would involve expenditure in an amount greater than their claim to ascertain their true identity and contact details. In the circumstances it is appropriate to proceed to determine the issues raised by the liquidator. Applications such as this may be brought *ex parte* and anyone who is prejudiced by the Court's determination may bring an application to vary it or to set it aside: r 39.05(a) of the *Federal Court Rules*.

15 In the circumstances it is appropriate to proceed with the determination of the issues raised by the liquidator.

The facts

The main participants

16 In early 2014, Mr Darwin engaged in promoting a scheme for the establishment and operation of a commune referred to as the "Bhula Bhula Community". He did so with his close associate, Mr Adrian Brennock, and they worked closely together on the project. As the facts below establish, Mr Darwin was the driving force and controller of the scheme and, for all relevant purposes, he controlled and directed the various corporate entities used. It is not necessary to reach any conclusion as to whether, in his promotion of the Community, Mr Darwin's and his associates' actions were fraudulent or reckless. Nevertheless, it cannot be denied that, although the subscribers were induced to pay money on the basis that it would be held on trust, it is clear that in dealing with that money neither Mr Darwin nor his associates were inclined to perform the obligations which a trustee owes to beneficiaries.

17 It is not unfair to say that those whom Mr Darwin induced to subscribe to the scheme were of a trusting nature or, perhaps, enthralled with the concept of living in a commune. Whatever be the case, they generally trusted Mr Darwin and, despite him not fulfilling numerous promises made to them, they neither seriously pressed him to perform nor sought to protect their own legal interests until it was too late.

18 It might also be fair to say that, although Mr Darwin had no formal qualifications on which he might rely to pursue this project, he had an element of charisma which, perhaps, caused others to join with him in the project without any significant questioning. A signature block at the foot of many of Mr Darwin's emails read: "TRUTHOLOGY: A Beacon of Truth, in The Seas of Lies". The "L" in the word "Truthology" was drawn as a stylised lighthouse, apparently as a representation of the alleged "Beacon of Truth". It is unclear whether he utilised this format because he had a heightened sense of irony or because it may have appealed to the somewhat vulnerable persons whom he targeted for this project.

19 Mr Darwin had identified approximately 250 hectares of land in northern New South Wales as the appropriate site for his commune. It was situated at 3222 Kyogle Road, Mount Burrell in New South Wales, being Lot 20 in Deposited Plan 755714A and 755714B and Lot 2 in

Deposited Plan 1148316 (being all the land in folio identifiers 20/755714A, 20/755714B and 2/1148316). It is referred to in these reasons as "the Property".

The promotion of the Community

20 From 2014, Mr Darwin commenced promoting the Community through web based presences named "Truthology Foundation" and "Global Awakenings Foundation", and at seminars called "Freedom Summits". The Community, as promoted, was portrayed as being a self-sufficient, environmentally friendly collection of like-minded people, residing on 642 acres of land in the Tweed Valley. In general terms, it was represented as providing a halcyon, alternative communal lifestyle, operating free of the usual societal norms.

21 In his principal affidavit in support of the application, the liquidator attached material acquired in the course of the liquidation, including documents derived from the website identified as www.bhulabhulacommunity.org. That website identified the proposal as an "intentional community", although the meaning of that expression is not identified. Whilst the initial promotional material identified that the Community would consist of approximately 60 parties, later material indicated that the number would be around 30, with each party being an individual, couple or family group. Each party accepted into the Community was to contribute financially towards the project. The amount was to vary with the time of joining. The total funds raised would be approximately $2,300,000, with the price of the Property being $1,200,000. After stamp duty and project management fees, approximately $900,000 would be available for the improvement and maintenance of the land (capital works, roads and dams etc). Each of the Community members or parties would have the exclusive use of a designated parcel of land, referred to as a curtilage, and they would receive a unit or units in a unit trust in which the land was held so as to give them ownership. Initially, the proposed trustee of the unit trust was identified as being Wollumbin Dreamtime Pty Ltd. The promotional material also referred to a "Unit Holders Agreement" which was to provide a method of allocating Community members to particular sites on the Property. It does not appear that any such document was ever produced, although one later version of a unit trust deed contained clauses which purported to regulate the actions of the unit holders to some degree.

22 A significant feature of the promotional material was its indication that the Community members would be entitled to build a dwelling on their assigned curtilage. Indeed, the whole tenor of Mr Darwin's promotion of the Community was that the members would be so

entitled. In one of the brochures Mr Darwin produced there was a heading "The Building of Dwellings" under which it was identified that all dwellings had to be of a suitable safety standard but the design and layout of the structure would be up to the individual. It was said that the Community would be open to "'alternative' style dwellings such as Earthships, Shipping container Homes and so forth". Preference was expressed for eco-friendly and green homes. The brochure added that it was the intention that most of the community members move onto their site as soon as possible, realistically between 12 and 24 months from the date of settlement. It was further envisaged that most plots would have a number of separate dwellings. These indicative statements were extremely aspirational as there was no existing town planning approval to use the land for multiple dwelling purposes and, indeed, no application for such approval had been made.

23 Mr Darwin produced or caused to be produced a brochure entitled "Community Land Project Expression of Interest", which was given to persons who had expressed interest in being involved in the commune. It contained information similar to that which appeared on the website and also advised that any funds contributed by persons interested would be held on trust through the Global Awakenings Foundation. The brochure reiterated that the participants would be granted an interest in a unit trust, the trustee of which would be controlled by directors elected by the members of the Community. The prospective participants were also told that the relevant legal documents and applicable by-laws would be prepared by a lawyer.

24 An essential aspect of the Community which appealed to subscribers was that the Property would be a place they could live. Whilst Mr Darwin was aware of the local government requirements that prohibited multiple dwellings on the Property, and that some form of Council approval would be required, he downplayed that to potential members. Some evidence before the Court indicated that he produced videos on the internet in which he bragged about not needing council approval. Indeed, it is apparent that he encouraged Community members to commence habitation on the land shortly after it was purchased. They quickly did so. Unfortunately, the money expended by them to establish those dwellings was somewhat wasted because their actions contravened the local government by-laws and, eventually, the Council took action to restrain the unlawful use of the land. Although there was little evidence in the matter concerning the town planning issues, what was available suggests that the project was doomed to fail from the beginning. The Property is located in a river catchment area which, in all likelihood, would have prevented approval

being given to allow it to be used for subdivision or multiple dwellings. At the very least a development application was required for the use of the Property for the proposed Community. That was apparently known by Mr Darwin although it is not clear why any application for the same was not lodged. Undeterred by its illegality, Mr Darwin and his associates pressed forward with the project. That said, it must be doubted that they held any honest belief that the Community which they promoted to the prospective members would ever be developed in the form which he espoused.

25 It appears that, in the initial stages and as part of the application process, persons who wished to participate in the Community were asked to complete a questionnaire which sought answers as to several personal matters. Apparently that was done to ascertain whether the applicant was "suitable" for the Community. The questionnaire indicated that a decision would be made on the acceptance of the applicant in March 2015. Consistently with other indications, the questionnaire indicated that funds received pursuant to the application would be held on trust by the Global Awakenings Foundation in its account. There seems to be little doubt that those who paid money into the account did so believing Mr Darwin's advice about the trust arrangements.

26 In March and April 2015, Mr Darwin sent an email to various prospective community members which attached a number of documents, including a draft deed. Those documents informed the readers that the beneficial interest in the trust fund was to be vested in the unit holders (cll 6(a) and 7(a)) and that the trustee could, if authorised or directed by special resolution, issue additional units (cl 7(d)).

27 During the promotion of the scheme, the prospective members were informed by Mr Darwin that the legal matters relating to the Community would be handled by a Mr Wroth Wall, Solicitor, who conducted his practice under the name "Wall & Company Lawyers". He was identified in the promotional material as being the solicitor who would handle the affairs of the Community. This was reiterated by Mr Darwin at various promotional meetings. It seems that a number of the prospective members of the community, or persons who became members of the Community, spoke directly to Mr Wall about the legal structure of the arrangements which were put or to be put in place. A number seemed to believe that he was their solicitor and that he acted in their interests. That belief may have been well founded. During the hearing a number of tacit allegations were made against Mr Wall as to the manner in which he handled Community members' money which was in his trust account. It must be

emphasised that Mr Wall was not a party to these proceedings and has not been afforded an opportunity to defend himself against those allegations. Any findings in these reasons are necessarily made without him being called upon, or indeed able, to explain his actions.

28 There was a commonality in the evidence of the defendants to the effect that they were all given the above information concerning the manner in which they would subscribe to the Community; how they would have an interest in the land; and the mechanism by which that was to occur. There is no reason to believe that any of the persons who subscribed to become members were not told the above and did not act in reliance on its accuracy. In general terms the subscribers paid their money on the basis that they would become members of the Community and the funds accumulated from the subscriptions would be used to acquire the Property and to improve and maintain it. Each member of the Community was to have an interest in the land of the same kind as the others, intended to be by reason of being issued a unit in a unit trust.

The expressions of interest

29 In reality, the identified processes and particulars for the establishment of the Community in the information provided by Mr Darwin proved to be more in the nature of general guidance than guaranteed covenants. A form of procedure was adopted for the collection of money from prospective community members although, as the liquidator correctly identifies, it was not always followed. On a number of occasions the prospective community member would complete an "expression of interest" form which was part of the documents referred to above. On some occasions, but by no means all, a questionnaire was completed by the prospective member. If the application for membership of the Community was accepted, the prospective member would be invited to submit an application to purchase a unit. The price for the unit varied over time, generally in line with the information provided in the promotional material. Initially the price for each unit was $40,000, which then increased to $80,000 and later $120,000 over 2014 and 2015. Towards the end of the process in 2016 it seems that the cost of a unit was $160,000 although the initial material did not indicate that units would be sold for that amount.

30 It should be noted that $500 was payable on the submission of an expression of interest. That was said to be refundable when membership was not approved (although it appears such a refund was not always provided). Several sets of bank records tendered in evidence show amounts of $500 being paid from time to time into accounts which appear to record receipt of

the fee accompanying the expression of interest. There is nothing to suggest that the payment of that sum was intended by any of the parties to generate an interest in any land or was to be held on trust. That said, it appears that on some occasions the amount was allocated as part of the subscription on the acceptance of a person as a Community member. In those cases it is right to treat it as part of the subscription contribution.

31 The evidence shows that the first expression of interest payment for the project was received on 10 March 2014. It was paid into an account called "Global Awakenings Foundation – Westpac Community Solutions Cheque Account" (GAF Account). The liquidator was not able to locate any entity with the name "Global Awakenings Foundation" and it appears that it was no more than a trading name used by Mr Darwin and his then partner, Ms Stephanie Humble, each of whom had access to and control of that account. Mr Darwin's evidence was to the effect that the account was used only to receive and hold funds paid by potential Community members or in connection with the Community. He said that he used money from the account for the purposes of setting up the Community or paying the deposit on the land to be acquired.

32 Various bank statements for the GAF Account were produced at trial by Westpac Banking Corporation, pursuant to a subpoena. They tend to disclose that Mr Darwin's evidence about the use of the account was not entirely accurate, although the sources of the funds and the debits are not entirely clear. Nevertheless, the accounts do show substantial credits which the liquidator has identified as having been paid by persons seeking to become members of the Community.

Pre-Purchase Subscribers

The GAF Account

33 The liquidator's evidence was that, based on the books and records available to him at the time of swearing his third affidavit (which did not include the GAF Account bank statements), a number of applicants seeking units in a trust made payments totalling $244,000 to the GAF Account. They were Tamati and Sarah Kirkwood, Craig Scott and Holli Kimlin, Phillip Morandini and Mette Pedersen, Mr and Mrs McSween, Emanuale Agus and Norma Porceddu, and Norma Mou. The liquidator referred to these as Pre-Incorporation Subscribers. That is a useful nomenclature, however, as will be seen in the following reasons, the division of interests as between Community members is, in some respects, potentially defined by whether they contributed money to the purchase price of the Property. As such, the

subscribers listed here will be considered as part of that larger group of "Pre-Purchase Subscribers", which includes some others.

34 The bank statements subsequently produced at trial by Westpac appear to reflect the transactions identified by the liquidator as comprising the $244,000, although there are differences in certain dates, and the contributions attributed to two couples appear to have been made in more than the one transaction identified by the liquidator for each couple. It is difficult to identify in the statements the $4,000 transaction identified by the liquidator as having occurred "about December 2014" (which may in fact refer to five payments between 31 March and 16 June 2014 comprising that amount). In addition, it appears that three significant transactions in the bank statements are not included in those identified by the liquidator:

(a) a deposit on 29 July 2014 of $39,500 (presumably linked to an earlier $500 expression of interest) without an identified transferor;

(b) a deposit on 4 March 2015 of $29,500 without an identified transferor, the purpose of which is unclear; and

(c) two deposits on 15 and 19 May 2015, each of $20,000, apparently by Richard Moate.

Whether (b) is a contribution in respect of an interest in the proposed Community is not immediately clear. In any event, the amount paid by subscribers into the GAF Account appears likely to be higher than originally identified by the liquidator, seemingly in the order of $320,000 to $350,000. In respect of (a) and (c), it is possible that one or both were later refunded, as did occur with a number of other transactions. This would reduce that amount.

35 The liquidator has then identified how funds from the GAF Account found their way to the trust account of Wall & Co. On 12 December 2014, an amount of $120,000 was transferred from the GAF Account to Stone Group Lawyers. On 21 January 2015, the same amount was received from Stone Group Lawyers into the Wall & Co trust account in the name of Mr Darwin. The liquidator has identified from trust account statements that approximately a further $100,000 was paid from the GAF Account to the Wall & Co trust account in the name of Mr Darwin.

36 The GAF Account bank statements confirm the above identified payments to the Wall & Co trust account, together comprising approximately $220,000, as:

(a) $120,000 on 12 December 2014 (transferred to Stone Group Lawyers, and later passed on to the Wall & Co trust account on 21 January 2015);

(b) $8,492.55 on 11 March 2015;

(c) $40,000 on 26 May 2015; and

(d) $50,000 on 1 June 2015.

37 The difference between the funds appearing to have been subscribed by payment into the GAF Account and those that eventually made their way to the Wall & Co trust account may *prima facie* suggest that a significant proportion of the funds subscribed into the GAF Account were not used for the purchase of the Property. However, as the liquidator has not been able to ascertain all sources and amounts of the funds used to pay the purchase price for the Property, it is possible that the contribution made from subscribers' funds paid into the GAF Account exceeds the approximately $220,000 that made its way to the Wall & Co trust account. For example, a withdrawal of $40,000 recorded in the GAF Account bank statements on 1 April 2015 may represent an otherwise unaccounted for contribution to the deposit for the purchase of the Property. This would be consistent with the following facts:

(a) Mr Darwin's evidence was that funds from the GAF Account were used to pay some of the deposit, and there is no other transaction in the statements that appears to do so.

(b) The only other known payment as part of the deposit was $40,000 paid on 10 February 2019 from the Wall & Co trust account in the name of Wollumbin Dreamtime (and later in the name of the Company). Given the purchase price of the property it seems likely that the deposit comprised more than the $40,000 paid on 10 February 2019.

(c) The actual deposit amount is unknown. The contract of sale indicates the deposit was to be $90,000. However, given that contract was only executed in late June 2015, well after the first part of any deposit was paid on 10 February 2015, and the fact that the sale process appears to have involved a number of 'false starts', it may be that the amount of the deposit actually held by the vendor's agent in the early stages (prior to that contract's execution) was variable.

(d) On 15 April 2015, the sum of $30,000 was paid into the GAF Account with the transaction description "EldersDepRefund". Elders Real Estate Murwillumbah were the agents for the vendor.

(e) On 16 April 2015, the next day, the same amount was transferred out of the GAF Account with the description "Hajek Rtn". This appears to be a reference to returning funds to Mr Michal Hajek, an associate of Mr Darwin's who had some involvement in the promotion of the Community.

(f) On 7 April 2015, the week before what appears from the above to be a refund of a contribution made by Mr Hajek to secure a deposit on the land, Mr Hajek indicated in an email to members of the Community that he and his partner were withdrawing from the community. On 9 April 2015, the other $10,000 that had been contributed by Mr Hajek to the Wall & Co trust account, received earlier on 7 April 2015, was refunded to Mr Hajek.

It would be consistent with the above facts that the $40,000 paid from the GAF on 1 April 2015 constituted part of the deposit for the purchase of the Property, in that it appears that, in the subsequent two weeks, $30,000 was able to be refunded by the vendor's agent. Alternatively, the $40,000 could have been a refund in relation to the subscription of $39,500 paid into the GAF Account on 29 July 2014, or to some similar effect. Relevantly, either of those possible constructions (or other alternative constructions) of the known transactions suggest that the difference between the subscribers' funds paid into the GAF Account, and the contribution of funds from that account represented in the purchase price, is not as great as it may first seem.

38 The funds in the GAF Account (which, it can be accepted, in addition to subscribers' funds, included other funds) appear at times to have been used for the purposes of establishing the Community, consistent with achieving the joint endeavour into which subscribers intended to enter. Withdrawal descriptions from the GAF Account include some appearing to relate to:

(a) hosting events at which the Community was promoted:

(i) $5,000 on 18 June 2014 described as "Venues";

(ii) $10,000 on 7 October 2014 described as "Summits";

(iii) $12,000 on 20 November 2014 described as "Venue";

(iv) $2,216 on 21 November 2014 described as "Accommodation";

(v) $3,000 on 21 November 2014 described as “Venue”;

(vi) $178 on 29 June 2015 described as “GoToMeetings”; and

(vii) $1,000 on 21 July 2015 described as “camp out goods”;

(b) legal and related expenses:

(i) $7,500 on 8 August 2014 described as “Trust Establishmen [sic]”;

(ii) $1,000 on 22 August 2014 described as “Stone Group Lawyer”;

(iii) $1,100 on 5 December 2014 described as “Company Reg”;

(iv) $2,000 on 3 February 2015 described as “Lawyers”;

(v) $3,000 on 6 February 2015 described as “Lawyer”;

(vi) $1,000 on 10 February 2015 described as “Lawyer”;

(vii) $3,000 on 19 February 2015 described as “Lawyers”;

(viii) $2,000 on 3 March 2015 described as “Lawyer”;

(ix) $3,000 on 5 March 2015 described as “Lawyer”;

(x) $3,000 on 4 May 2015 described as “Legal”;

(xi) $801.85 on 24 June 2015 described as “Company Est”; and

(xii) $1,500 on 3 July 2015 described as “Insurance”;

(c) general expenses:

(i) $1,000 on 10 October 2014 described as “Exp”;

(ii) $1,500 on 4 December 2014 described as “Exp”;

(iii) $1,000 on 19 December 2014 described as “Exp”;

(iv) $733 on 17 March 2015 described as “Exp”; and

(v) $1,000 on 19 March 2015 described as “Exp”;

(d) advertising and finding new subscribers:

(i) $3,238 on 12 November 2014 described as “Website Part 1”;

(ii) $500 on 15 December 2014 described as “Website”;

(iii) $900 on 10 February 2015 described as “Echo Ad”;

(iv) $1,000 on 24 February 2015 described as “Louis Video”;

(v) $900 on 24 February 2015 described as “Echo”;

(vi) $290 on 25 February 2015 described as “Ad design”;

(vii) $1,500 on 2 March 2015 described as “Web Changes”;

(viii) $500 on 12 March 2015 described as “Video editing”

(ix) $600 on 7 April 2015 described as “Echo”;

(x) $1,500 on 23 April 2015 described as “Web”;

(xi) $1,000 on 27 April 2015 described as “Web”; and

(xii) $1,000 on 27 April 2015 described as “Artwork Max”; and

(e) financing expenses:

(i) $3,300 on 23 June 2015 described as “Adelaide Finance”.

To what extent the descriptions recorded for the above transactions are accurate, or should be taken to reflect funds expended (solely) for the benefit of the Community, is not clear. However, it can be accepted that at least some of the funds contributed by subscribers that did not find their way into the purchase price of the Property were otherwise expended in the course of the joint endeavour of the Community, such as for the preliminaries required for establishing the Community, including preliminaries in relation to the acquisition of land.

39 On the other hand, it also appears that some funds in the GAF Account, although not necessarily those contributed by subscribers, may have been expended by Mr Darwin for his own purposes. There are, among other things, a number of substantial cash withdrawals, withdrawals for “project management”, at least one withdrawal described as a “loan”, an apparent payment of an energy bill (prior to the acquisition of any land), and a number of withdrawals described by the initials or parts of the name of Mr Darwin and his partner. However, as the subscribers’ funds were unquestionably trust funds, Mr Darwin can be presumed to have withdrawn and used his own funds for his other purposes so as not to deplete the trust in an unauthorised manner: *Re Hallett’s Estate; Knatchbull v Hallett* (1879) 13 Ch D 696. That presumption is consistent with Mr Darwin’s email of 12 January 2015 advising that the funds he was transferring from the GAF Account to Mr Wall’s trust account were the funds deposited by subscribers.

The Wall & Co funds

40 From December 2014, Wall & Co Lawyers were engaged to undertake a number of tasks in the establishment of the Community. Mr Wall established a number of files for this work under the names of Mr Darwin or Wollumbin Dreamtime Pty Ltd in relation to different aspects of the work. That company had been incorporated in late 2014 and Mr Darwin was

appointed as its director on 5 December 2014. Mr Darwin was the sole shareholder of that company.

41 It also appears that another firm, Stone Group Lawyers, had at least previously been engaged in relation to the establishment of the Community. Further, Mr Michal Hajek, who was described in various emails as a lawyer, was also said to have been providing legal assistance. Whether he was entitled to act as a lawyer is unclear.

42 From around January 2015, subscribers to the Community were directed to pay their money directly to a trust account with Wall & Co which was recorded as "140193 Formation of Community – Mr Mark Darwin". By this time the contribution required for a subscription to the Community had risen to $80,000.

43 It appears that an agreement to acquire the Property was entered into around 10 February 2015, when the sum of $40,000 was paid to the vendor's agent as a deposit. (It appears that any such contract, which was not in evidence, would have been superseded by that agreed in June 2015). A trust account receipt identifies that the payment had been made by or on behalf of Wollumbin Dreamtime. Although the evidence available is somewhat scant, it can be reasonably inferred that any sum paid as a deposit was not returned to Wollumbin Dreamtime and was retained by the vendor and applied against the purchase price, even though a different company became the purchaser.

44 A brochure dated 25 February 2015 produced by Mr Darwin stated that parcels of land for up to five acres were available for $80,000 and that the purchaser would have the use and enjoyment of the community areas as well. Relevantly the brochure stated:

> The entry price of a unit is $80,000. This is fully refundable if the project doesn't settle in the land. The only parties who are at risk for the current expenses of the project are the Steering Committee.
>
> Funds will be held in TRUST through the Lawyer Wroth Walls' Trust Account …

The purchase

45 On 14 April 2015, Mr Darwin advised existing and prospective subscribers by email that he had secured a loan to use in the purchase of the Property if it were needed for settlement. He indicated that the loan would be discharged by the introduction of further parties as members once the land was acquired. The Pre-Purchase Subscribers were content to proceed on that basis. That is important as it evidences the common intention of the parties to the joint endeavour that the loan would be discharged by further members being admitted to the

Community who would then have rights of the same kind as them, including an interest in the land. The email also identified the further understanding of the group that once the land was acquired a further ten parcels of land (or units in the unit trust) would be offered to further persons who would also become community members. Their money would be used for the purposes of completing infrastructure such as roads, the community centre, orchards, dams and the like.

46 Consequent upon the sending of the email it seems that a number of existing members of the proposed community agreed to pay $80,000 to acquire additional units in the trust so as to make up the funds necessary (in addition to the loan) to settle the purchase. Those persons entered into agreements with the Company which indicated that, on the purchase of the Property, the Company would sell those additional units in the trust for $120,000 from which those subscribers would be repaid with an additional $40,000. The agreements were with Mr Agus, Ms Plant and Mr Cantrell, Ms Hirsch, and Mr Morandini and Mr Scott.

47 By an email on 26 May 2015, Mr Darwin indicated that sufficient funds had been raised by way of existing subscribers taking up additional parcels in the Community. He also indicated that he had made an offer to purchase the land for $1,175,000, which had been accepted. That seems incongruous given that a deposit of $40,000 had been paid in February of that year.

48 By an email on 27 May 2015 to the subscribers, Mr Darwin advised that all remaining funds had to be received into the Wall & Co trust account within the next few days; that all parties were required to sign authorities to allow Wall & Co to apply their funds towards the purchase monies for the land; and that units in the trust would be issued "probably the day prior to settlement". He also reiterated the legal structure of the proposed arrangement whereby Wollumbin Dreamtime would own the land as trustee and it, in turn, would be owned by a company controlled by the members of the Community. Later that day, in a further email, he indicated that only those who had paid money directly into the Wall & Co trust account were required to sign an authority to release the funds.

49 The records show that between January and 22 June 2015 (the day the Company was incorporated), a number of deposits were made into the Wall & Co trust account by several subscribers, including by Mr Newman, Ms Mou, Mr Berry, Ms Hirsch and Mr Morandini together with Mr Scott (also Pre-Purchase Subscribers). Further, between 22 June 2015 and 30 June 2015, it appears that Mr Agus, Mr Cantrell, and Mr Pascoe and Ms Barnes also made

deposits into it. These latter subscribers are also referred to as "Pre-Purchase Subscribers" in these reasons although the manner in which their money was used in the purchase of the land, if at all, was not entirely clear.

50 At some time in late June 2015, the Company formally entered into a contract to purchase the Property for a price of $1,175,000. The Company was identified on the contract as "Wollumbin Horizons Pty Ltd t/as Bhula Community Village Trust". The contract is dated 30 June 2015, although the completion date is said to be 25 June 2015.

51 The sale was completed on 30 June 2015 using the funds paid by the subscribers and funds from the loan secured over the Property. The liquidator has identified that funds for the purchase were derived from at least the following sources:

(a) $40,000 as a deposit from Wall & Co trust account 150025 (initially in the name of Wollumbin Dreamtime but subsequently in the name of the Company);

(b) $588,459.85, $4,563.80 and $50,135 (the latter figure for stamp duty) from the Wall & Co trust account in the name of Mr Darwin (which includes funds which were transferred from the GAF Account to the Wall & Co trust account); and

(c) a loan of $550,000 (although that figure includes pre-paid interest) to the Company from Adelaide Investments (Aust) Pty Ltd which was secured by a registered mortgage on the Property.

As discussed above, it is also possible that the $40,000 transfer from the GAF Account on 1 April 2019 represented a contribution to the purchase price.

52 It must be kept in mind that on the settlement of the purchase of the Property, it appears that an amount of approximately $283,000 remained in the Wall and Co trust account which was derived from the subscribers' contributions. The evidence does not reveal the identity of the persons who were the source of those funds, although it may be surmised they originated from those subscribers who paid their funds into the trust account after 22 June 2015. That conclusion is supported by the fact that it does not appear that those persons provided to Mr Wall any authority to use their funds for the payment of the purchase price of the Property, with the possible exception of Mr Cantrell. It is not clear that they provided any authority to Mr Wall authorising him to use those funds at all, but that is not relevant for present

purposes. Nevertheless, it appears that those funds were subsequently used for the purposes of establishing the Community or perhaps in the discharge of the mortgage over the land. These assumptions are somewhat arbitrary as the subscribers' funds in Mr Wall's trust accounts were inextricably mixed with the result that it is somewhat artificial to attempt to compartmentalise the numerous contributions without the assistance of any reliable ledgers.

53 During the course of the trial it became apparent that all of the members of the Community at the time of the Property's purchase had the intention that it would ultimately be held unencumbered by the Company. It was also the apparent common understanding that the loan used to complete the purchase would be repaid using funds received from subsequent subscribers who became members of the Community. A useful example is Mr Agus' evidence that he was aware that subsequent contributors would come in and acquire an interest in the Property "[a]t the beginning". That appears to be the basis on which Mr Darwin indicated he would get in new members and that seemed to be accepted by the members.

Mortgage Subscribers

54 Subsequent to the purchase, Mr Darwin sold further subscriptions in the Community. The evidence shows that the following new subscriptions were made (in approximate terms):

(a)	Dixon	$60,000
(b)	Sharron & Graham Simmons	$30,000
(c)	Dean Mooney	$120,000
(d)	Gillian Norman	$120,000

55 Some of the subscribers at that stage were new to the scheme, and some were existing subscribers who contributed additional funds in return for an additional interest. All were told they would acquire an interest in the Community of the same kind as the existing subscribers by reason of their contributions.

56 In addition, on one view of the facts, the following persons who contributed their funds in the period between 22 June 2015 and 30 June 2015 might by also be taken to have contributed to the mortgage discharge in the following amounts:

(a)	Dixon	$20,000
(b)	Cantrell and others	$80,000

(c)	Emanuele Agus	$30,000
(d)	Neil Pascoe and Nicole Barnes (aka Teleah Barnes)	$80,000

57 As mentioned above, not all of the subscribers' funds in the Wall & Co trust account were used in the settlement of the purchase of the Property and the trust account records suggest that the remaining funds had been contributed by the above persons in the above amounts. That is, if it is assumed that the trust funds had not been completely mixed. A significant portion of those remaining funds were transferred to a different account and used to discharge the mortgage. Nevertheless, these subscribers contributed funds to the scheme along with others for the purposes of discharging the purchase price of the land and it is not entirely possible to conclude their funds were not used as they intended. It follows that for the purposes of the following legal analysis these identified subscribers ought to be classified as Pre-Purchase Subscribers.

58 The subscribers who contributed funds after the purchase and prior to the discharge of the mortgage (including additional contributions by existing Pre-Purchase Subscribers, to the extent of their additional subscription) are referred to as the "Mortgage Subscribers".

59 The accounts further show that a Mr and Mrs Fagan also paid $3,000 into the account from which funds were used to repay the loan. However, that payment appears to have been referable to the acquisition of an interest in a different scheme. Similarly, a sum of $500 was paid into the account by a Ms Cooper, but that sum appears to be referable to the expression of interest fee rather than for an interest in the Community.

60 On 25 September 2015, Mr Darwin informed the members that he had obtained sufficient funds to discharge the mortgage on the Property and that occurred on 30 October 2015, after payment of $551,005.10 to the lender on 21 October 2015. Subject to a caveat lodged by Ms Hirsch who claims "an equitable interest in the land pursuant to an interest of a beneficiary under a trust and/or an interest of a unit holder in a unit trust", the Property is now unencumbered.

Post-Discharge Subscribers

61 In early 2017, despite the difficulties by then encountered (as discussed below), Mr Brennock and Mr Darwin sought to sell further interests in the Community to additional persons. Unfortunately, they were successful in doing so. Those new subscribers were induced to become members by the same representations as those made to the existing members and

they paid their funds on that basis. Mr Alderman and Ms Dresdon paid $160,000 for a unit in the trust, most of which they paid into a Westpac account held by Wollumbin Dreamtime on 18 October 2016 and 23 January 2017. As the mortgage had been discharged, those funds were not used to acquire the land, although they were to be used in the operation of the Community. These subscribers are called the "Post-Discharge Subscribers".

62 Mr Alderman and Ms Dresdon paid a further $20,000 in respect of the "The Mount Burrell Commercial Precinct" which was a project to be established on land adjacent to the Community land. Mr and Mrs Fagan also paid $120,000 in respect of that proposed development. However, it would appear that none of these funds were paid by the subscribers to become members of the Community.

63 It must be kept in mind that the introduction of new members to the Community after the acquisition of the Property was an integral part of the scheme from the beginning. It was the intention of the Pre-Purchase Subscribers at the time of the purchase that new subscribers would become members of the Community and that their subscribed funds would be used for the maintenance and improvement of the land. It was also the intention of the Mortgage Subscribers that new members would be introduced and their funds would be used for maintenance and improvement. In other words, those who became members had the common intention to engage in a joint endeavour with the other members to establish the Community and continue it, intending that the subscriptions of each member would be applied to the purchase, maintenance and improvement of the Property, and that each member would have an interest in the Property. That common intention continued to exist at each stage when new members were invited to join the Community.

64 As their affidavits disclose, Mr Alderman and Ms Dresdon were shown around the Property by Mr McSween, the director of the Company at the time, and his partner Kelly McSween. They were told that they were able to erect a worker's hut or studio on the property and were offered an interest in the Property by way of a unit in the unit trust. They were informed that the payment for the unit which they made would be used for the benefit of the Community by way of discharging the expenses of infrastructure, town planners and surveyors. The money would also be used for paying fees to the Tweed Shire Council in respect of the development of a neighbouring commercial development associated with the Community. In reliance on the representations made they paid the sum of $160,000 to a Westpac account in the name of Wollumbin Dreamtime believing that, in return, they would acquire an interest in the

Community by way of a unit in the unit trust. Mr Staatz has given evidence that it is not clear to him that the money so paid by Mr Alderman and Ms Dresdon was, in fact, used for the benefit of the Company or for the purposes of the trust. Then again, he does not identify how the money was used. From the relevant bank statements, it appears substantial amounts were expended on lawyers, council rates, surveying and similar. Some was withdrawn as cash. The actual use to which the funds were put is difficult to ascertain.

65 Although the members of the Community paid scant interest to the manner in which the trust which they believed existed operated or, if they did, they were not concerned enough to take action to enforce its performance, it is manifest that they were prepared to allow the Company and Mr Darwin to continue to promote the Community. One such activity which they permitted to occur was the Company's encouragement of new members to join. Indeed, the evidence is that when potential new members were shown around the Community various existing members spoke highly of it to them. The evidence before the Court was that Mr Morandini and Mr Mooney each informed Mr Alderman and Mr Dresden of the benefits of the Community. This, it should be noted, was at a time after Mr McSween had identified the Community's parlous financial situation and the existence of a number of inter-personal disputes. Whether the state of the Community was as Mr Morandini and Mr Mooney might have stated does not matter. It was apparent from the material provided to the members of the Community when they subscribed that, apart from the money which was used to acquire the land, the Company and Mr Darwin would seek additional persons to become Community members to provide additional funds. The Expression of Interest document identified that the purchase price of the Property was $1,200,000 but that units in the unit trust would be sold raising $2,300,000 and, after expenses, $900,000 would be available for work on the land such as the community centre, roads and dams. It was clear to all subscribers that persons whose money was not used to pay the cost of the acquisition of the land but to improve it would also have an interest in the Property.

Attempts to establish the unit trust

66 While the subscriptions were being received and the land purchased, there were steps taken toward the establishment of the envisaged unit trust.

67 On 24 March 2015, Mr Darwin emailed those who had subscribed or intended to subscribe, informing them that Mr Wall would issue them with an authority to sign and return to allow the funds to be withdrawn for the acquisition of a unit in the unit trust. It was represented

that the funds received from them would be held in the trust account at Wall & Co for the subscribers. Annexed to that email was a diagram purporting to represent the legal structure of the Community. It identified that Wollumbin Dreamtime would hold the land on trust for the members as beneficiaries, and that company would be owned by a community association so as to be under the control of the members. The evidence before the Court shows that this was the structure which Mr Darwin regularly promoted to persons interested in joining the Community.

68 The liquidator has also ascertained that some work was undertaken to establish a unit trust with Wollumbin Dreamtime as the trustee. An unexecuted Deed of Trust between Mr Darwin and Wollumbin Dreamtime, dated 25 March 2015, has been located. It does not appear that the document was ever executed even though it was circulated amongst the existing potential members. It seems to be common ground that the draft trust deed was not proceeded with because it was anticipated that Wollumbin Dreamtime could not be the trustee of the trust. That was because it would not be able to obtain finance to purchase the Property, if that were needed. The reason for that inability was, apparently, the lack of creditworthiness of Mr Darwin, who was its sole shareholder and director.

69 On 14 April 2015, in Mr Darwin's email advising that a loan had been secured, he also said it was intended that, shortly before the settlement of the purchase, a meeting would be held at which the units in the unit trust would be issued. This was, apparently, at the suggestion of Mr Wall. That allegation is credible, because Mr Wall would have been acutely aware of the inappropriateness of the subscribers parting with their funds without securing an interest in the trust on which the land was to be held.

70 On 4 June 2015, Mr Brennock, who was part of Mr Darwin's business, Truthology, sent an email to those persons who had subscribed to become members of the Community. In it he asserted that he required certain documentation completed by them so that the sale could proceed. He referred to the subscribers as being "unit holders" and indicated that they were required to sign authorisations directed to Mr Wall who was described as being "our own lawyer". Mr Brennock identified that one of the authorisations was directed to Mr Wall to permit the release of funds held in trust to pay for the property. That was clear evidence of his knowledge that the funds were held on trust for the particular subscribers. Another document which the subscribers were required to sign was an application for a unit in the unit trust. No trust had actually been established at that time.

71 Mr Brennock's knowledge that the subscribers' funds were held on trust continued when the Company, Wollumbin Horizons Pty Ltd, was incorporated on 22 June 2015. He was its sole and only shareholder. He has been a director of it in the periods from 22 June 2015 to 4 January 2016 and 19 April 2017 to date, although other persons have also acted as directors. The email of 4 June 2015 shows that Mr Brennock, and therefore the Company of which he was director, once incorporated, had sufficient knowledge that the subscribers' funds were held on trust for them. That said, it was also not controversial (although Mr Darwin was not particularly open to the suggestion in the witness box) that the Company was used by and controlled by Mr Darwin, albeit not formally a director, as a vehicle for the acquisition of the Property. The Company was established with the purpose of concealing Mr Darwin's involvement in its control, to avoid deterring lenders. He accepts that he was one of the scheme's founders, and its promoter, and that his involvement in the purchase planning (on and after the day of incorporation) was "full-on". Mr Darwin spoke on behalf of the Company (see, for example, his email of 23 June 2015, the day after its incorporation, where he attached a new trust deed in the name of the Company). He was involved in instructing its lawyer. His control of the Company was sufficient to warrant the conclusion that his knowledge was also that of the Company.

A trust deed is executed

72 The liquidator located a further trust deed which is dated 23 June 2015 and which purports to appoint the Company as the trustee of a trust known as "Bhula Bhula Community Village Trust". The trust deed has been executed and was stamped on 6 July 2015. In his written submissions, the liquidator has accurately analysed the terms of the trust (which are not disputed) as follows:

> (a) by clause 1.a)(4), "Trust Fund" was defined to mean "the said initial sum [$20 paid by the settlor] and all moneys paid to and accepted by the Trustee upon the issue of Units pursuant to clause 7 hereof, the accumulations of income hereinafter directed or empowered to be made, all accretions to the Trust Fund and the investments and property from time to time representing the said money and accumulations or any part or parts thereof respectively";
>
> (b) by clause 1.a)(9), "Unit" was defined to mean "an undivided part or share of the Trust Fund evidenced by a unit held by a Unit Holder in accordance with this Deed";
>
> (c) by clause 1.a)(10), "Unit Holder" was defined to mean "the person for the time being registered under the provisions of this Deed as the holder of a Unit and includes persons jointly so registered";
>
> (d) by clause 1.a)(12), "register" was defined to mean "the Register described in

Clause 8 of this Deed";

(e) by clause 5, the Trustee stood possessed of the "Trust Fund and the income thereof upon the trusts and with and subject to the powers and provisions" therein;

(f) by clause 6(a), the "beneficial interest in the Trust Fund as originally constituted and as existing from time to time shall be vested in the Unit Holders for the time being";

(g) by clause 7(a), each "Unit shall entitle the registered holder thereof together with the registered holders of all other Units to a beneficial interest in the Trust Fund as an entirety … no Unit Holder shall be entitled to the transfer to him of any property comprised in the Trust Fund":

(h) by clause 7(c), "All Units shall comprise one class and shall at any and all times have and equal [sic] equitable interest in the Trust Fund";

(i) by clause 7(d), if "authorised or directed by a Special resolution [defined therein as a resolution passed by an 85% vote of those present and eligible to vote on the resolution], the Trustee shall issue additional Units at a subscription price as determined in the Special resolution";

(j) by clause 8, the Company was to keep a register of Unit Holders and "the person from time to time entered in the register as the Unit Holder shall be the only person recognised by the trustee as entitled to the Units registered in his name".

73 As was observed by the liquidator, the trust deed did not identify any base number of units to be issued and nor did it identify a subscription price. It does not appear that any register of units was established or maintained and nor does it appear that the Company passed any resolutions for the issuing of any units in the trust. That was confirmed by statements from its subsequent director, Mr McSween. The evidence before the Court shows that there was a failure to make any attempt to ensure that the persons who subscribed for membership of the Community received a unit in the identified unit trust at or around the time of the purchase of the Property. Although the events surrounding the establishment and administration of the trust are obscure, it can be ascertained that whilst the trust deed was executed, it was soon forgotten about. Whilst some subscribers were invited to apply for a unit, none were issued. Halfway through the following year Mr McSween, then the director of the Company, sought to resurrect it to provide benefits to others who were not entitled to them, but it is fair to say that, assuming the unit trust was initially valid, it was abandoned *ab initio*.

74 After the purported creation of the trust, it appears that a copy of the trust deed was sent to some of the prospective community members. In an email of 23 June 2015, Mr Darwin asked that the subscribers complete the application for a unit in the Bhula Bhula Community Village Trust. It would appear that these were returned to Mr Darwin or the Company

although the liquidator has not been able to obtain a copy of each one. In that email, the subscribers were also asked to sign a new direction to Wall & Co in relation to the funds held on trust. The direction form read:

> TO: Wall & Company Lawyers
>
> 43 Stuart Street
>
> MULLUMBIMBY NSW 2482
>
> I, …… hereby authorise and direct you to pay the sum of $80,000.00 paid by us into your trust account towards the purchase monies for the property at 3332 Kyogle Road, Mt Burrell. I/we acknowledge that the funds are to be paid on behalf of Wollumbin Horizons Pty Ltd as trustee of the Bhula Bhula Village Community trust and that the purchase price of the property is: $1,175,000.00.
>
> I/we hereby confirm that the funds are being paid by me/us on the basis that an ordinary unit in the trust will be issued to us and that I/we have satisfied myself/ourselves concerning the terms of the trust deed constituting the trust, the membership of the trust and the status of the above land. In that regard we also confirm that I/we know the land does not have the benefit of a Development Consent from Tweed Shire Council for the purpose of a rural land sharing community.
>
> Dated this 23rd day of June 2015

75 The liquidator gave evidence that he had been able to ascertain that authorisations in these forms were provided by, at least, Ms Mou, Ms Plant and Mr Cantrell (who provided an authority to Wollumbin Dreamtime), Mr Moate, Mr Newman, and Ms Stokes and Mr Maddren. It is far from clear that all persons who contributed money for the acquisition of the Community land executed an authorisation. That said it appears that Mr Brennock received copies of those which were returned.

76 Despite the applications for units in the unit trust being received by the Company, and Mr Darwin's assurances that units would be issued prior to the land being acquired, no units were issued. The same was later true for the Mortgage Subscribers and Post-Discharge Subscribers.

77 At this point it is relevant to observe that the funds subscribed by the Community members or, more accurately, the persons who believed that they were Community members, were used, via a trust account in the name of Mr Darwin, to discharge the purchase price of the Property. However, it is pellucid from the circumstances that the discharge of the purchase price was only authorised on the basis that the Company which owned the Property was the trustee of a unit trust *in which they held units*. There can be little doubt that this would have

been apparent to all concerned including Mr Darwin, Mr Brennock and the relevant solicitor at Wall & Co. There was no explanation as to why no units were issued to the members and that is unusual given that Mr Wall required the Community members' authorisation to transfer funds to pay the purchase price, but he apparently failed to ensure that they received that which they were to acquire for their contribution.

78 Further, in the period from 23 June to 22 September 2015, some of the funds held in the name of Mr Darwin in the Wall & Co trust account (matter number 140193) were transferred out to the GAF Account and an account held by a so-called "Orion Foundation". This was done at the direction of Mr Darwin. That was unusual in various respects. First, trust account receipts for the funds paid by subscribers into the account were apparently given to the individual subscribers, not Mr Darwin. Secondly, Mr Darwin's emails revealed that he informed subscribers that Mr Wall was not able to disburse money without their signing authorities. Third, the authorities that were signed directed the funds to be applied towards the purchase price. Fourth, at least one of the relevant transfer receipts (on 20 July 2015) quotes a different matter number than the part of the solicitor's trust account from which it appears to have been deducted. The omission from the liquidator's evidence of one page of the relevant trust account statement covering that important period makes the task more difficult, however as far as can be ascertained on the evidence before the Court, some of the money in Mr Wall's trust account was not paid towards the purchase price but transferred to accounts maintained by Mr Darwin. Whether there was a failure of Wall & Co to strictly comply with the beneficiaries' directions and any consequences that follow are not matters which need to be considered in these reasons: cf *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 498 [32]-[33], 499 [35].

The failure of the commune

79 Far from acting in a professional manner, the standard of care exercised by those in charge of the establishment of the Community and its legal structure failed to reach the heights of a careless amateur. Nearly every aspect of the necessary arrangements was shambolic. There is some evidence from some of the initial members of the Community that Mr Darwin was aware before the land was acquired that there would be very little opportunity for constructing residential dwellings on the Property, but he chose to proceed in any event. There is no need to make any findings on this point but it must be recognised that the manner

in which the Community was sought to be established was extremely reckless for anyone, let alone for Mr Darwin who professed to have worked in the area of "business and finance".

80 The words "Bhula Bhula" allegedly mean "together in harmony". From the Community's inception, it was not so. By 13 February 2016, Mr Brennock, who incorrectly described himself as "director and trustee", wrote a letter to the Community members whom he also incorrectly described as being "Bhula Bhula Unit Holders and Investors". That latter description was at odds with the fact that the Company had not issued any units and nor had it created a register of unit holders, being something of which Mr Brennock would or should have been well aware. In the letter he indicated that he had engaged the accounting firm, Worrells, and an independent auditor. It was said that the purpose was to bring the Company's books up to date and to provide a report to the unit holders and creditors. That Mr Brennock had not properly maintained the Company's books is probably good evidence of his deficient management abilities. Although the letter refers to a disturbing level of disputation amongst the Community members it also identifies that, at the time, the Company was in an "insolvent position", in "severe and fatal financial difficulty" and unable to repay loans which it currently owed to four investors. Mr Brennock said:

> The company in my opinion as Director is insolvent and unable to meet its obligations at this point in time and for the foreseeable future. All avenues, including Voluntary Administration and Liquidation are being considered by the Trustee as solutions to this deadlock.

His comments about the Company's lack of solvency were hardly surprising given the Community had no income stream. The only source of revenue was to sell further interests, but that could only ever provide temporary relief.

81 Although the evidence is not entirely clear, it appears that, shortly after the Property was acquired, some Community members took up residence there and their activities extended to constructing dwellings. It appears that these dwellings were not permitted or authorised under to the local town planning regulations. Although there were a number of persons living on the Property it is not clear what other activities occurred, though it seems that the members engaged in the unauthorised building of roads and dams.

82 By early 2016, the Tweed Shire Council had undertaken a number of inspections of the Property and had identified the dwellings, being shipping containers and tents, were unauthorised, as were earthworks and construction work which had been carried out. It had become concerned that there were multiple dwellings on the Property despite there being no

approval for such use of the land. The Council's inspections and the concerns it raised in subsequent correspondence highlighted the fact that the intended endeavour of the establishment of a community on the Property was unlawful and could not succeed. That was probably most apparent when, in early 2016, the Council sent to the Company a "show cause notice" in relation to breaches of the planning law arising from the use of the Property.

The purported issuing of units in the unit trust

83 A somewhat telling letter was sent by Mr McSween on 18 August 2016 to all the "so called" members of the Community. At that time Mr McSween had become a director of the Company but the letter was to advise of his resignation and of other matters. In it he informed the members of what he referred to as the "current perilous status of the company". He said that he was refusing the applications of a number of members (Ms Norman, Ms Stanton and Ms Plant) which indicated that, as at that point in time, the determination as to who would be the members had not occurred. It would also seem to follow that, until that date, no units in the unit trust had been issued. That conclusion is reinforced by Mr McSween's statement (which apparently was made to persons who had been approved), "I have issued your Unit Certificate and it is attached to this correspondence". It was further asserted that non-voting units had been issued to other parties including lenders and creditors. Finally, Mr McSween asserted that the Company had been replaced as trustee of the Unit Trust with "Wollumbin Dreamtime Pty Ltd".

84 As was the case with most of the actions of Mr Darwin and those associated with him, the purported conduct of Mr McSween was both misguided and uninformed. Although he purported to issue 30 unit certificates (some without voting rights) in the trust, he did so without any special resolution of the Company rendering the purported issue invalid. Further, certificates were issued to people who had not made an application to the Company for a unit and there was no power under the trust deed to issue a unit in that circumstance. Indeed, some had made an application for a unit in the earlier abandoned unit trust. Otherwise the purported units were erroneously issued in the wrong name or omitted a joint subscriber.

85 It is noticed that Mr McSween's letter is at odds with that of Mr Brennock in February 2016 in which the latter referred to the subscribers as being "unit holders". On the facts as they appear in this matter, Mr Brennock's statement was misleading and, given that he was in a position to know the true facts, perhaps deliberately so.

86 As mentioned, it does not appear that the Company actually made any resolution to issue any units in the unit trust to any person and no unit register was established or maintained. That is important as, in order for a person to be a unit holder under the trust deed, they needed to be registered as such. This failure of Wollumbin Horizons to initially issue any units was quite probably indicative of the disorganized and lackadaisical manner in which the Community and the arrangements for its legal structure were undertaken.

87 On 27 January 2017, the Company purported to issue a further certificate to Mr Alderman such that it could receive a further subscription from him but again the requirements for Mr Alderman to become a unit holder were not met. Strangely, the material located by the liquidator reveals that a unit was apparently issued to Mr Alderman and Ms Dresdon some months prior to them making an application for it. The Court can have no confidence that the purported issue of the units was authorised or valid or done otherwise than to conceal the conduct of the Company prior to being placed under external administration.

88 No party before the Court suggested that Mr McSween had caused Wollumbin Horizon to issue any valid units in the Bhula Bhula Community Village Trust. The submission that, regardless of what Mr McSween did, no valid units were issued and none of the subscribers became a unit holder should be accepted.

89 The complete lack of professionalism with which Mr Darwin, Mr Brennock and their associates acted can further be seen in certain additional material located by the liquidator. On 24 February 2017, certain documents were purportedly executed by the Trustee, the Company and by Wollumbin Dreamtime. The efficacy of those transactional documents was wanting. They were apparently not ratified by a special resolution as required by the trust deed. One document purported to be a deed of appointment of Wollumbin Dreamtime as a new trustee of the Bhula Bhula Community Village Trust. That was bizarre for a number of reasons. It is to be recalled that, in August 2016, Mr McSween said that Wollumbin Dreamtime had replaced Wollumbin Horizons. Further, the power to appoint a new trustee under the trust deed vests in the unit holders and there had been no meeting of unit holders to exercise that power. Perhaps tellingly, Wollumbin Dreamtime executed the document as the sole unit holder even though it never held a unit. Again, if that were so it might be reflective of the Company's opinion that no units had been validly issued to the Community members to that point in time. It may well have been that Wollumbin Dreamtime was the sole unit holder although there is no evidence that such was the case. There is no register of unit

holders and no apparent certificate. Nevertheless, the document does, in some ways, suggest that Wollumbin Horizons considered that the Community members were unit holders. Again, no party before the Court suggested that these documents were effective to appoint a new trustee and they were obviously not.

Litigation with the Tweed Shire Council and insolvency

90 The lack of professionalism exhibited by Mr Darwin and his associates had the result that the attempted development of the Property as a community proceeded prior to any appropriate planning permission being granted. Consequently, in September 2016 the Tweed Shire Council commenced proceedings against the Company in the Land and Environment Court of New South Wales. Its concern was the existence of a number of unauthorised structures and development activity on the Property. That litigation proceeded for a number of months until, on 6 April 2017, the parties agreed to orders relating to development applications and the removal of structures on the Property. Importantly, the Company agreed to pay the Council's costs of the proceeding. That was significant as the Company had no income stream from which it might source funds to pay those costs.

91 As mentioned, in August 2016, Mr McSween purported to exclude Ms Norman, Ms Stanton and Ms Plant as members of the Community. This led Ms Norman, in March 2017, to issue a statutory demand against the Company seeking repayment of the funds which she had paid. The amount of $120,000 was said to be a "refund of a payment made for a land-share consideration that failed". Although the Company attempted to set aside the statutory demand, the attempt was largely unsuccessful with the amount in dispute being reduced to $115,840. The Company did not comply with the demand or have it set aside and was deemed to be insolvent.

92 Another dispute arose between the members of the Community and Mr Berry, who is the first defendant. It led to steps being taken to remove Mr Berry's entitlement to remain part of the Community. It appears that he was given what was said to be a notice of eviction although its veracity is somewhat doubtful. On 13 May 2016, Mr McSween issued to Mr Berry what was said to be a notice requiring him to remove himself from the land. He purported to do so on behalf of Wollumbin Horizons as the owner of the land in question. Somewhat arbitrarily, the notice indicated that the amount paid by Mr Berry as his purchase of an interest in the Community would be refunded, less what were said to be fines and remediation expenses.

The source of the purchase monies

93 As the liquidator's submissions focused upon the existence of a resulting trust arising from the acquisition of the Property by the Company using the subscribers' funds, they paid particular attention to the sources of funds from which the purchase price was paid. Although ultimately an analysis using the imposition of a constructive trust is preferred, the liquidator's analysis is not irrelevant to an understanding of what occurred. He identified that the sources of funds in the Wall & Co trust account were as follows:

(a) the funds derived from various subscribers in the amount of $1,269,500;

(b) funds provided by Stone Group Lawyers (probably from the account held by Global Awakenings Foundation) in the amount of $120,000;

(c) funds from Global Awakenings Foundation, in the amounts of $50,000, $8,492.55 and $40,000; and

(d) funds from another trust account held by Wall & Co in the amount of $2,610.73.

94 The evidence supports the proposition that the funds from Stone Group Lawyers were originally derived from subscribers' funds which had been paid into the GAF Account, and the money otherwise paid out of that account was also derived from subscribers. It was not suggested by Mr Darwin or anyone else that the original source of the money to pay the purchase price of the property and all of the associated expenses of the purchase of the land was other than the subscribers.

95 As the liquidator observes, although the funds sourced from the members of the Community were held in trust accounts at Wall & Co, Mr Darwin paid no attention to his obligations in relation to them and, to some extent, he treated them as his own, in the sense that he used them for purposes other than the acquisition of the land. It was shown that from the various trust accounts $80,510.01 was paid to a company related to Mr Darwin, namely Organamazing, the sum of $50,000 was paid to Global Awakenings Foundation, and a further sum of $40,000 was paid to "Orion Foundation". It is unclear whether those funds have been recovered or sought to be recovered.

The source of the money for the purchase price paid on settlement

96 The liquidator asserts that it is not now possible to precisely trace the specific money paid by individual subscribers into the purchase price of the property. That necessarily gives rise to

difficulties ascertaining the proportionate beneficial interests of the subscribers, if it were necessary to trace the trust funds into the purchase price. However, the inability to trace the specific funds into the purchase price does not necessarily preclude a conclusion that the subscribers' funds taken as a whole were used to acquire the land: *Helou v Nguyen* [2014] NSWSC 22. In that case Lindsay J said (at [103]):

> The complexity that can attend the process of tracing money should not obscure the purpose, and nature, of the exercise. It involves a demonstration, by an application of logic and experience to evidence, of what has in fact happened to identified property, with changes of form, over time. It is a process of identification to ascertain whether property can be traced from one form to another, culminating in a finding that property in its current form can properly be regarded as a substitute for the claimant's original form of property: *Foskett v McKeown* [2000] UKHL 29; [2001] 1 AC 102 at 128, approved in *Robb Evans of Robb Evans & Associates v European Bank Limited* [2004] NSWCA 82; (2004) 61 NSWLR 75 at 103 [131] - 105 [148] and *Heperu Pty Limited v Belle* [2009] NSWCA 252; (2009) 76 NSWLR 230 at 252 [89]; *Re Global Finance Group Pty Limited* [2002] WASC 63; (2002) 26 WAR 385 at 406 [94] et seq, approved in *Commonwealth of Australia v The Official Trustee in Bankruptcy as the Trustee of Property of Stephen Vasil* [2004] NSWSC 1155 at [21].

97 Here, on one view, the question is neither complicated nor complex. The evidence establishes that the only sources of funds for the cost of acquisition of the Property, the payment of the purchase price, the payments in discharge of the mortgage, and the costs of maintenance and improvements, were persons who subscribed to become members. It is not suggested that the Company itself provided funds and nor did Mr Darwin. Even if they did deposit funds into the trust account the mere mixing of funds does not prevent the tracing of the funds into the land: *Foskett v McKeown* [2001] 1 AC 102 at [131]; *Scott v Scott* (1963) 109 CLR 649 at 662. It was also clear that the funds were paid to Mr Darwin and the Company on the basis that they would be held in trust. Those express trusts were manifested even though it is apparent that Mr Darwin failed to perform all of his obligations in relation to them. If he did mix his own funds in any of the accounts it is to be assumed that any withdrawals for unauthorised purposes were of his own money.

98 The money paid by the initial subscribers to the GAF Account, was subsequently paid into the trust account of Wall & Co or otherwise expended (possibly in part as a contribution to the deposit, as discussed above). Mr Wall caused some of it to be paid to other accounts operated by Mr Darwin but, nevertheless, it seems to have been used to discharge part of the purchase price of the land less the amount of the loan. At all times it was held on trust to be used for that purpose. Money from these initial subscriptions and subsequent ones paid directly into the Wall & Co account were apparently paid to accounts under the control of Mr

Darwin. Money from that account was used to discharge a substantive part of the purchase price.

99 In brief, there was no real doubt that the funds amassed from the subscriptions of the various Community members were placed in the trust account of Wall & Co and, albeit indirectly, used to discharge the purchase price of the Property to some extent. That was within the scope of the intention with which the money was provided and received. In some respects it is apparent that Mr Darwin used some of the funds to promote the scheme so as to garner sufficient interest, but it is difficult to identify which funds were used for that purpose.

100 The fact that title to the land was vested in the Company is irrelevant. That too was generally in accord with the intention of the subscribers, Mr Darwin and the Company. The common understanding was that the trust funds emanating from the subscribers would be used to purchase the Property which the Company would hold on trust for the members of the Community. Apart from the fact that the unit trust failed, that is what generally occurred.

101 The only real difficulty arises when attempting to ascertain how the respective subscriptions were used by Mr Darwin and the Company. As mentioned, a substantial amount of subscribers' money remained in the Wall & Co trust account after settlement of the purchase and it is not possible to reach a satisfactory level of certainty as to the identity of the persons who paid those funds into the account. Indeed, it can be said that those funds were merely the remainder of an undifferentiated whole of the subscribers' funds. As is discussed below, this is important in relation to any analysis of the respective parties' interests on the basis of a resulting trust, as there it is important to be able to trace or follow a subscribers' funds into the discharge of the purchase price. It is less relevant on a constructive trust analysis. On the other hand, this issue may be somewhat chimerical in that those funds not used to discharge the purchase price were, in part, subsequently used to discharge the mortgage.

The source of funds to discharge the mortgage

102 The liquidator submitted that some of the funds used to discharge the mortgage over the Property in the sum of $538,133.83 could be traced to particular members, although that identification might depend upon the allocation of subscribers who contributed between 22 and 30 June 2015 into the categories of subscribers. That allocation and tracing exercise is not ultimately relevant to the conclusion reached.

The contributions of individual subscribers

103 During the course of the liquidation, the liquidator has sought information from each of the apparent subscribers to the Community as to the circumstances in which they paid money to Mr Darwin or one of his companies for the purposes of becoming part of the Community. A number of those persons have given evidence in the form of affidavits or oral evidence during the course of the hearing. The liquidator has also garnered evidence from various subscribers. His views as at the time of trial as to their respective circumstances appear to be as follows:

(a) Ms Mary-Lou Plant and Mr John Cantrell paid a $500 deposit to the GAF Account and $79,500 on 27 April 2015 to the Wall & Co trust account for the purchase of a unit. On 23 June 2015 they paid a further $80,000 pursuant to agreement dated 23 June 2015 by which they acquired an additional interest in the Community on the basis that it would be later sold and the money refunded to them together with an additional amount.

(b) Ms Melissa Hirsch paid $75,000 on 20 April 2015 to the Wall & Co trust account for the acquisition of a unit in the trust and a further $85,000 on 28 May 2015. It appears that Ms Hirsch paid for two units in the trust having executed an agreement for a second unit, on a similar basis to Ms Plant and Mr Cantrell.

(c) Mr Phillip Morandini (together with his partner Mette Pedersen) paid $40,000 from March to December 2014 into the GAF Account. However, it appears that in mid-2015 Mr Morandini and his business partner Mr Craig Scott were also prepared to advance $80,000 to the venture to ensure the purchase of the Property. On 26 May and 22 June 2015 they paid $8,000 and $32,000 respectively, and on 22 June 2015 Craig Scott paid $40,000, all to the Wall & Co trust account. Mr Morandini and Mr Scott in a letter to the liquidator asserted that the money advanced was a loan in the sum of $80,000 pursuant to an explicit agreement that they would be paid $120,000 for what was a short-term loan to Wollumbin Horizons as “Trustee of BBVCT”. It is apparent that the money represented the acquisition of another interest in the Community which occurred as part of the fund raising activities of Mr Darwin.

(d) Mr Richard Moate claimed to have paid $40,000 in 2015 for the acquisition of a unit in the trust. Two payments to the GAF Account on 15 and 19 May 2019 appear to be related to him, which payment appears to have been transferred to the Wall & Co trust account on 26 May 2015.

(e) Mr Terry Poulios and Ms Nastasja Poulos claim to have paid $80,000 on 1 June 2016 "for purchase of unit". It is unclear whether the funds were a subscription for membership of the Community or for some other purpose.

(f) Mr Andrew Cody claims to have paid $1 for the acquisition of a unit with the remainder of the cost of the unit having been paid for in exchange for services performed at the Property.

(g) Mr Brian Alderman said he paid $20,000 on 1 June 2016, $20,000 on 18 October 2016 and $120,000 on 23 January 2017, for purchase of a unit in the trust. As mentioned above Mr Alderman and his wife had inspected the Community in May 2016 and been given misinformation about the legality of erecting a dwelling for themselves on the Property. Initially they were told that the purchase price of their interest in the Property would be used for the benefit of the Community in discharging expenses relating to town planning, infrastructure, surveyors and payments to the Tweed Shire Council for the next stage of development. Overall, they paid $160,000 for the acquisition of an interest in the Community. Whilst they also paid for the acquisition of a unit in the Mt Burrell Commercial Precinct development, that payment affords them no interest in respect of the Property.

(h) Mr Emanuele Agus paid $40,000 on 6 January 2015 to the GAF Account for the acquisition of an interest in the Community. He subsequently made an application for a unit in the first proposed unit trust. That was well before any trust was established and Mr Agus was one of the initial participants. Subsequently, he agreed to advance a further $80,000 to allow the property to be acquired. He paid $50,000 on 23 June 2015 and $30,000 on 24 June 2015 to the Wall & Co trust account. He was to receive an additional interest in the Community for his payment.

(i) Ms Gillian Norman paid $120,000 on 26 August 2015 to the Wall & Co trust account for the purposes of acquiring an interest in the unit trust so that she may become part of the Community. It is apparent that the money received

from Ms Norman was used by Wollumbin Horizons to discharge the mortgage which had been taken to secure the loan which permitted the purchase to take place. Ms Norman subsequently claimed to be a creditor of the Company in respect of the purchase price paid. It was in that capacity that she issued the statutory demand against the Company. Somewhat inconsistently she claims that she is also entitled to an interest in the Property. For present purposes, the liquidator accepts that Ms Norman paid money for the purposes of acquiring a unit in the unit trust and that her money was used to discharge the loan taken to secure the land.

(j) Mr Marc Fagan and Ms Rebecca Fagan paid $3,000 on 2 September 2015 to the Wall & Co trust account. It is not clear that the payment was to become a member of the Bhula Bhula Community, although in a questionnaire they suggested they were seeking to acquire a unit in the unit trust which was established.

(k) Mr Martin Maddren claimed he paid $40,000 on 3 June 2016 for a "unit" although it is not clear why this occurred at that time.

(l) Ms Nichole Barnes (aka Teleah Barnes) and Mr Neil Pascoe paid $80,000 in two transfers on 25 June 2015 to the Wall & Co trust account for the acquisition of a unit in the unit trust.

(m) Ms Norma Mou, who was one of the initial subscribers, paid $500 on 12 December 2014 to the GAF Account as an "expression of interest and deposit towards unit purchase". She subsequently paid $10,000 on 27 January 2015, $32,000 on 28 January 2015 to the Wall & Co trust account, and $29,200 and $13,300 on 28 May 2015 to the GAF Account for what she described as a "unit in BB Community Village trust" (she was refunded $5,000 from the Wall & Co trust account on 9 July 2016).

(n) Steven McSween claims to have paid $40,000 for the "purchase of unit". Five payments on 31 March, 27 May, 9 and 16 June 2014 (two on the last date) to the GAF Account totalling $4,000 appear to relate to him, and it may be that the payment of $36,000 on 12 December 2014 to the GAF Account is the remaining part of the subscription.

(o) Stuart Newman paid the sum of $80,000 (comprising $500 on 22 December 2014 to the GAF Account and six payments between 12 and 16 January 2015

to the Wall & Co trust account) for the purpose of securing a unit in the unit trust.

104 As mentioned, these are the conclusions of the liquidator at the time of trial and on a preliminary view they appear sound. However, the liquidator will need to finalise any views before a distribution is made in accordance with these reasons. In addition to those subscribers who provided information to the liquidator, as identified above, he will need to assess the subscriptions of Mr and Mrs Kirkwood, Mr Scott and Ms Kimlin, Mr Berry, Mr Dixon, Mr and Mrs Simmons and Mr Mooney. It may be that new evidence comes to light which may elucidate the status of various subscribers. It may also be that the evidence which was adduced at trial will disclose the existence of additional subscribers such that those persons identified above may not represent all of the Community members.

105 The liquidator submits there is a question around the amounts paid by various persons as "loans" to allow the purchase to proceed. Although the subscribers may have thought that the written agreements between them and Wollumbin Horizons constituted loans by them, they were, in fact, agreements whereby they would acquire additional units in the unit trust with a collateral agreement that the Company would cause those units to be sold to other persons in the future and the proceeds of the sale paid to the subscriber who would receive $40,000 more than they paid. This was recognised by the liquidator in his written submissions. In effect, they acquired a further interest in the Community albeit one which would be subsequently transferred to another incoming member. As matters have turned out, they are quite possibly better off recovering as the holders of additional beneficial interests rather than as unsecured creditors.

106 In his written submissions the liquidator has prepared a number of schedules identifying the manner in which the Community members' funds might be identified as contributing to the purchase price of the Property. The first scenario assumes that the accounts operated so that funds first deposited to the accounts were first removed and used. The second scenario utilised an approach based on the proportion of funds used from the various accounts which were applied to the purchase price. The third scenario calculated the respective proportionate interests based upon the total amount contributed by each person whose contribution went, in some way, towards the payment of the purchase price or the discharge of the mortgage. Whilst helpful, those schedules do not provide the correct method for distributing the various interests.

The administration and liquidation of Wollumbin Horizons

107 In his written submissions, the liquidator submitted that from its incorporation, "the Company acted only as trustee for the purpose of holding the Property" and that while other projects were considered and discussed between the subscribers, they were subsequently pursued by another entity. Whether that other entity acquired those opportunities from the Company as a result of a breach of fiduciary duty by Mr Darwin is not a matter relevant to these reasons, although the evidence before the Court on this topic tended to suggest that it was a business opportunity which arose in the context of the Community scheme. Despite that, the liquidator's submission, as advanced, cannot be accepted. True enough the Company was incorporated to be the trustee of a unit trust, to be the owner of the land and perhaps in some way to operate the Community. Indeed, the terms of the trust deed also purported to regulate the relationship of the unit holders. The difficulty is though that it failed to establish the intended trust and the trust of which it was trustee, being a resulting or constructive one, did not involve the same obligations as arose under the unit trust deed.

108 Mr Staatz was appointed as the administrator of the Company on 4 July 2017 pursuant to s 436A of the *Corporations Act*. At that time the unsatisfied statutory demand issued by Ms Norman was outstanding and the Company was liable to the Tweed Shire Council in respect of the adverse costs order. It was quite clearly insolvent even if Ms Norman's statutory demand was possibly invalid and, as the evidence above demonstrates, it had been insolvent for some time.

109 Although a number of the defendants in these proceedings sought to agitate an issue about the conduct of the first meeting of creditors and the admission of creditors to vote, there were no resolutions passed at that meeting and no nomination of any committee of creditors, nor was there any nomination of any alternative administrator. After the statutory report to creditors was prepared and distributed, a second meeting of creditors was held. Again, some defendants wished to raise concerns about the manner in which that meeting was conducted. That also is not an issue in these proceedings. In any event, the meeting was apparently conducted in accordance with the requirements of the *Corporations Act*. The meeting voted to wind up the Company, a committee of inspection was formed and it was resolved that Mr Staatz's remuneration be approved on an interim basis.

110 On the material adduced in these proceedings, no legitimate criticism of the conduct of Mr Staatz in the conduct of the administration, the meeting of creditors or in the administration

of the winding up can be sustained. On the contrary, on the material which is available, he and his legal representatives have approached their tasks in a professional manner in difficult circumstances. Those difficult circumstances include being required to deal with the actions of some of the defendants who have been particularly querulous. Some of those perceive themselves to have a degree of legal knowledge or intuition, although that belief was misguided. Their actions have caused the liquidator to incur substantially greater costs than might otherwise have been the case.

The proofs of debt

111 The liquidator has received proofs of debt from subscribers in respect of their claims totalling $1,748,840.18 although not from all identified subscribers. Whilst it is apparent that a person who subscribed money for the purpose of becoming a member of the Community might be either a beneficiary of a trust of those funds or an asset purchased with those funds on the one hand or, on the other, a creditor, no criticism can be made of the subscribers for not knowing where they stood in relation to the company. In the circumstances where the management and operation of the Company and trust by Mr Darwin and his associates failed to comply with minimum standards of regularity, it is not surprising that the subscribers were not able to ascertain their actual legal position.

Consideration of issues

The failed unit trust

112 The trust deed dated 23 June 2015 sought to establish a unit trust, the corpus of which would comprise an initial sum of $20.00 and "all moneys paid to and accepted by the Trustee *upon the issue of units*" and "property from time to time representing the said money" (emphasis added). No party before the Court suggested that the anticipated unit trust did not fail in the sense that the Property did not ever become an asset of that trust. The word "Unit" was defined by reference to the "Unit Holder", in turn defined by reference to the "register" of units to be kept under the deed. No register was created or maintained. Therefore, no units were issued. There being no units issued, no moneys (perhaps other than the $20.00 initial sum, if paid) became the corpus of the trust, no subscribers to the Community became beneficiaries or unit holders, and the Property purchased with their moneys could not become the subject of that trust.

113 Although much later, on 18 August 2016, Mr McSween purported to issue units, he failed to do so effectively. He failed to create or maintain a register. He purported to create different

classes of units, something not permitted by the deed. He had, "as of the date of this correspondence", being the date he purported to issue the units, resigned as director of the trustee. Moreover, the units were said to be issued under the "proposed trust deed", which may indicate acceptance of its failure or abandonment, or suggest the purported issue was not referable to the executed deed at all. In any event, no money was paid to and accepted by the trustee "upon the issue of units".

114 It might also be observed that the purpose of the express trust appeared to be illegal, in the sense that the Property could not be used for the envisaged purpose without town planning approval. While the absence of approval was acknowledged by a number of subscribers, it appears that the actual intention of the parties was to immediately take up residence, as reflected in the first schedule of the trust deed which purported to set out rules for the peaceful dwelling of the members on their designated curtilages of land. That the Community's establishment may have also been an unregistered "managed investment scheme" within the meaning of s 9 of the *Corporations Act 2001* (Cth) was yet another legal difficulty, its operation by the Company in that case subject to the proscription in s 601ED(5).

115 The liquidator submitted that, in the above circumstances, the Company held the property purportedly settled, being $20.00, on a resulting trust for the settlor: *Boyce v Boyce* (1849) 16 Sim 476. There is force in that submission. The best that might be said in relation to the unit trust is that, even if it was validly established, the conduct of the parties shows that it was effectively abandoned thereafter as a vehicle for holding the legal title to the land.

116 In the circumstances the liquidator is entitled to the direction that he is justified in treating the deed of trust dated 23 June 2015 between Peter Hetherington, as settlor, and the Company, as trustee, as ineffective and the trust purportedly established thereby as invalid, at least to the extent to which it related to the Property.

The parties' intention

117 There was no express or implied intention, agreement or arrangement between the Community members that the Property should be held on trust for them in shares which corresponded to their contributions to its purchase price. Indeed, their actual intention was that, on joining the Community, each would have an equal interest in the Property regardless of the amount of their contribution. The unit trust deed which was perceived to govern their relationship provided for a member to leave and any new member would have the same rights

and interests in the Property. Further, there is nothing which suggested that the parties held any intention that if the Community arrangements fell apart or came to an unexpected end they would be entitled to an interest in the Property commensurate with the amount of their contribution to the purchase price of the property or to the Community. The common intention of the parties at every stage, albeit staggered as each new member joined, was that each would have an equal interest once they became a member and the Community was fully established.

118 To the extent to which it might be thought that the parties had any intention at all, it was governed by the terms of the trust deed of 23 June 2015 or, in the case of some of the first members who joined, the prior draft deed. That would be the right to be paid the unit price of the unit if they chose to leave. By the deeds it was expected that the parties would reside on the land and improve it and each member would establish a home there. The subscriptions which were not used to pay for the purchase price of the land were to go to the preliminary costs of establishing the Community or, in respect of later ones, intended to be used to improve the land for the benefit of all members and to meet the operational costs such as rates and the like. That is, the latter subscriptions would be used for the purposes of the same joint endeavour. In these circumstances it would be unreal to think that, if the joint endeavour failed, the later subscribers would be thought to be making a gift of their subscription to those who paid the purchase price for the Property.

The trust or trusts which emerged

119 The next issue is to characterise the legal relationship between the Company and the subscribers or the relationship between the subscribers *inter se*, arising from the failure of the Community. On this the parties had differing submissions, which was not surprising given the uncertain implications of the surrounding factual circumstances and that recent developments in the legal taxonomy of trusts suggests that some overlap may exist between various categories.

120 Amongst the possible characterisations, there are two central hypotheses. First, that the Company's interest in the land is held on a resulting trust for the Pre-Purchase Subscribers (and possibly the Mortgage Subscribers), with the possibility of a temporally sequential constructive trust analysis in favour of later subscribers. Secondly, that the Company's interest in the land is held on a constructive trust for all subscribers arising from a failed joint endeavour or a common intention. These are considered in turn.

121 However, before doing that it is appropriate to acknowledge that, as the discussion below reveals, the nomenclature given to the trust or trusts which arose as a result of the failure of the unit trust has little practical difference to the rights of the parties. That does not mean that the characterisation of the circumstances fit equally satisfactorily into each of the alternatives. It is merely to observe that, to some extent, the application of different equitable principles to the same factual circumstances unsurprisingly tends towards a similar outcome. Although the second hypothesis is ultimately preferred, as the parties' submissions were primarily made based on a resulting trust analysis, that hypothesis will be considered first.

The first hypothesis: a combination of resulting and constructive trusts

The initial resulting trust

122 Gibbs CJ said in *Calverley v Green* (1984) 155 CLR 242 at 246:

> Where a person purchases property in the name of another … it is presumed that the purchaser did not intend the other person to take beneficially. In the absence of evidence to rebut that presumption, there arises a resulting trust in favour of the purchaser. Similarly, if the purchase money is provided by two or more persons jointly…

There is no question here of the contrary application of the presumption of advancement.

123 The liquidator and some of the defendants submitted that the effect of the transactions before purchase is that, the unit trust having failed to take effect, the Property is held on a resulting trust for those who had subscribed the funds used to purchase it: *Calverley v Green*, 246; *Imam Ali Islamic Centre v Imam Ali Islamic Centre* [2018] VSC 413, [391]. This was said to be a "bare trust", where the trustee had no obligations other than to hold the property for the subscribers in proportion to their contributions: *Goodfriend v Goodfriend* [1972] SCR 640 at 646; *Dyer v Dyer* (1788) 30 ER 42 (Ch). The facts give some support to that submission but there are a number of difficulties that arise. Importantly, it needs to be observed that those parties advancing this analysis did not suggest that other subscribers had an interest in the Property, or to the extent they might, they said it was inferior to theirs. However, as the discussion below reveals, if the earlier subscribers did hold the land on a resulting trust, the later subscribers advancing funds to their detriment on the faith of receiving an interest in the land would probably be entitled to a declaration of a constructive trust obligation on the part of the relevant holder of the beneficial interest in their favour.

124 The first step in the analysis is identifying that the funds used in the purchase were those of the subscribers. Although the purchase price was paid from the GAF Account and Wall &

Co trust account, it seems uncontentious that the subscribers paid funds into those accounts on the basis that they would be held there on trust to be used for the establishment of the Community and especially in purchasing the land. The unambiguous oral and written statements of Mr Darwin leave no uncertainty as to the intention that a trust relationship existed in that respect: *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62 per Gageler J at [109]. The "outward manifestation of the intentions of the parties within the totality of the circumstances" was that a trust should exist in relation to the funds advanced and that is an appropriate determinant of whether a trust-creating intention exists: *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493, [119]. There is potentially some difficulty where it appears that not all of the funds subscribed to the GAF Account and Wall & Co account were actually used for the purchase price (and necessary incidentals: Dal Pont, *Equity and Trusts in Australia* (2015, 5th ed), n 60 on p 788). The totality of the Pre-Purchase Subscribers' funds was not used for discharging the purchase price and the remainder was, mostly, used subsequently in the discharge of the mortgage. This adds a not insignificant complication to the identification of the subscribers whose funds might be said to have been used to discharge the purchase price even if it can be said with certainty that the beneficial interests in the funds held on trust in the GAF Account and Wall & Co trust account remained with the subscribers and, in that sense (at least), the purchase funds were those of the subscribers.

125 However, the critical difficulty with the *Calverley v Green* analysis here is that the presumed intention on which a resulting trust might be founded is displaced. It was the express intention of the parties that they would each have an interest in the Property and that was so regardless of whether their particular funds went to the purchase price or were expended on preliminary costs, stamp duty and the like, the discharge of the mortgage or the subsequent costs of maintenance and improvement. Additionally, the express and actual intention of the parties was that the beneficial interests would not correspond to the proportionate financial contributions of Pre-Purchase Subscribers alone, but rather to be shared with later subscribers and members of the Community (and subject to an express unit trust). In such a case there is no room for a presumption that the Property would be held for the Pre-Purchase Subscribers in shares commensurate to the contribution to the purchase price: *Muschinski v Dodds* (1985) 160 CLR 583, 612; *West v Mead* (2003) 13 BPR 24,431 at 24,444 [62].

126 On the other hand, there was no express intention as between the parties as to what the position would be if the unit trust failed to take effect. The difficulty is that the parties

proceeded as if the unit trust was established and the land was held on that trust. Another difficulty is that the subscribers, who were neglectful about securing their legal rights, did not fully appreciate the deficiencies in the establishment of the unit trust. Whilst some pressed Mr Darwin for the issue of their unit, he was not responsive, and they did not press the matter very far. To that extent, while members of the Community may have chosen to seek some remedy in the nature of a resulting trust or similar, they did not, and they allowed and continued to pursue the joint endeavour of the Community. That acquiescence or delay presents a further difficulty for any party asserting a resulting trust analysis.

127 An alternative analysis proffered was that the subscribers settled a trust for a particular purpose or event, and the purpose or event failed, giving rise to a resulting trust: *Burgess v Rawnsley* [1975] Ch 429, 441. The trust 'settled' in that sense could not be the unit trust which had failed to take effect as any settlement. Thus the analysis must proceed that the trust settled was the payment to the GAF Account or Wall & Co trust account, held by or in the name of Mr Darwin or Mr Wall as trustee for the purpose or event of establishing the unit trust. The unit trust failing to be established, the purpose or event failed, and the funds in those accounts were then held on resulting trust for the subscribers, so the analysis proceeds, presumably allowing the funds to be traced or followed into the Property. However, as with the *Calverley v Green* analysis, the difficulty is that there is no room for such a presumed intention where an express intention existed and the subscribers proceeded to pursue the joint endeavour of the Community and bring in more subscribers despite the problems encountered.

Could any resulting trust include the Mortgage Subscribers?

128 If it were accepted that a resulting trust arose in favour of the Pre-Purchase Subscribers, the next question would be whether the Mortgage Subscribers acquired any interest in the land.

129 Some defendants submitted that these subscribers did not have any interest. In the usual course, a resulting trust does not arise in relation to property acquired prior to the contribution of funds by the person who seeks the imposition of the trust because the property in question does not represent trust money: *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211 (*Bishopsgate*). The discharge of a mortgage over property is not regarded as part payment of the purchase price and no inference of a trust usually arises: *Calverley v Green* at 257-258 per Mason and Brennan JJ. That said, there is some authority to the effect that, in some circumstances, the use of trust money to discharge a mortgage incurred by a trustee can

give rise to resulting trust where the loan, which the mortgage secured, was used to fund the acquisition of land. In *Bishopsgate*, Dillon LJ at 216-217 left open the question of whether this form of "backward tracing" could occur where there was a sufficient connection between use of the funds in question and a particular acquisition. In such circumstances it was also suggested that an equitable charge might arise. See also *Foskett v McKeown* [1998] Ch 265, 283G-284A and *Shalson v Russo* [2005] Ch 281, [141]. That observation may apply with some force in the present case where a number of subscribers paid their funds for the purposes of discharging the purchase price but, unknown to them and the other Community members, significant amounts were retained in the Wall & Co trust account and subsequently used to discharge the mortgage. To the extent to which those funds can be said to be derived from the specific subscribers it is difficult to see how their payments towards securing the unencumbered title to the land, which was the object of the exercise, could be excluded from the tracing exercise.

130 Recently in *Lucas v Lucas* [2018] NSWSC 962 at [159] Sackville AJA considered the manner in which the discharge of a mortgage may alter the beneficial interests of persons interested in property. His Honour said:

> The general principle is that a contribution to the purchase price of a property for the purposes of the law of resulting trusts must be made prior to the acquisition of the property. Thus payments in reduction of a mortgage debt are not usually relevant in determining the payer's equitable interest in the property, although it may be relevant on an equitable accounting. If the parties intend to acquire land free from a mortgage, as distinct from acquiring title to land subject to a mortgage, the contributions made to discharge the mortgage can be taken into account in determining the parties' respective beneficial interests. Mortgage payments therefore may be considered when quantifying the parties' interests under a resulting trust of a mortgage free investment. However, this will rarely be the case when the property is acquired as a home for one or both parties to live in." (citations omitted)

131 That passage was referred to with approval by Hallen J in *Papas v Co* [2018] NSWSC 1404, [343]. In this matter the intention of the parties was quite clear. The Pre-Purchase Subscribers all intended to contribute money to the acquisition of the land and intended that each would receive a beneficial interest in it but they also accepted that a loan would be required to complete the purchase. They also intended that additional persons would take up an interest in the land with their contributions discharging the mortgage. In those circumstances the Pre-Purchase Subscribers can be taken to have intended that their interests on acquisition would not extend to the encumbered portion of the land: *Bloch v Bloch* (1981) 180 CLR 390, 402 per Brennan J; cf *Calverley v Green* at 262-263 per Mason and Brennan JJ. There was no suggestion that the mortgage would be discharged from other revenue as

the Community had no revenue stream. It follows that the Pre-Purchase Subscribers and the Company accepted that the Company would subsequently dispose of the beneficial interest it retained to new subscribers. The difficulty here is that it was not the actual intention of the parties that the subscribers' interests would be proportionate to their respective contributions once the Community was fully established. Regardless of when they joined the Community and paid their subscription the subscribers, all intended that everyone would have an equal interest in the whole of the Property. The Pre-Purchase Subscribers did not intend to have an interest only in the unencumbered part and those whose money discharged the mortgage intended to have an interest in the whole. That, again, tends to inhibit the identification of any presumed intention which is a necessary element of the resulting trust either in relation to the occasion when the purchase price was paid or when the mortgage was discharged.

132 It was suggested in the course of submissions that the issue might be resolved by reference to the observations of Campbell J in *Black Uhlans Incorporated v Crime Commission* [2002] NSWSC 1060 at [143] where his Honour observed in relation to the assertion of an interest in property acquired before the provision of any financial contribution:

> As well, sometimes conduct after the acquisition of title might provide a basis for someone who has made contributions to payment of mortgage instalments to claim a proprietary interest on some basis other than that of a resulting trust, such as constructive trust, or equitable charge or lien. Alternatively, payment of contribution to mortgage instalments might give rise, in some factual situations, to a claim for reimbursement, on the basis of an equity of contribution, or some restitutionary basis.

133 To the extent that his Honour's comments identify the possibility of a constructive trust or equitable lien arising in cognate circumstances there is much force in the observation.

If not beneficiaries to any resulting trust, could the Mortgage Subscribers take constructively?

134 In the absence of a resulting trust arising from the contributions of the Mortgage Subscribers which discharged the mortgage, it is appropriate to consider whether a constructive trust would otherwise arise in the circumstances, assuming a resulting trust had arisen in respect of the Pre-Purchase Subscribers.

135 When those Mortgage Subscribers applied for a unit in the unit trust, the Company took their money and discharged the mortgage over the land. It purported to "sell" or "assign" to them an interest in the land which was commensurate with the interest of the other Community members. At the time, the shared intention of the existing members, the new subscribers and the Company was that the new subscribers would be unit holders in a unit trust. That trust

failed. Nevertheless, at the very least, it was the intention of all that the new subscribers were to have an equitable interest in the land as a member of the Community with the legal title remaining in the Company. The full consideration for the interest in the Community was paid by the new subscribers and that money was used for the discharge of the mortgage despite the failure of the Company to issue any units to the Mortgage Subscribers. It is apparent that the Company also granted the new subscribers access to the Property and they went onto it and expended money in establishing some form of accommodation believing they had an interest in it.

136 Although Mr McSween subsequently asserted that some of the new subscribers were not accepted as members of the Community and, therefore, had no interest in the Property, that assertion was without merit and disingenuous. Whilst the envisaged unit trust failed to materialise, the objective intention of the parties was that the new subscribers were accepted as members of the Community and that they had an interest in the land. That was the basis on which they provided funds for the discharge of the mortgage and the basis on which the money was used. Although it was apparent that, in the initial stages of the Community, there was some informal approval process by which parties would be accepted as members, that seemed to have lapsed by the time Mr Darwin sought to secure funds to discharge the mortgage. In those circumstances it is difficult to see that Mr McSween's subsequent attempt to assert that Ms Norman's application had been rejected had any efficacy. The same can be said of the purported rejections of Ms Stanton and Ms Plant and the purported expulsion of Mr Berry.

137 It follows that the there was a common intention that the Mortgage Subscribers would have an interest in the Property and there was detrimental reliance on that intention by them when they subscribed their funds and, in some cases, moved onto the land. The suggestion by the Company or the other members that they do not have an interest in the land is unconscionable in the equitable sense and equity will not permit them to assert to a greater interest in the Property so as to defeat the interests of the Mortgage Subscribers: *Baumgartner v Baumgartner* (1987) 164 CLR 137, 147-148 per Mason CJ, Wilson and Deane JJ, 152 per Toohey J.

138 It is apparent that a significant factor in this case is that the important arrangements underpinning the legal structure of the Community were bedevilled by an almost complete lack of formality. Whilst it may be that an application for a unit in the unit trust was

completed by some of the Mortgage Subscribers, compliance with the unit trust deed seemed to end there. The Company received the funds and, indeed, used them, although there was no hint that any corresponding unit was issued. By that time the matter of the issuing of units had seemed to have evaporated. Despite the funds being held on trust, Mr Darwin and the Company used them to discharge the mortgage and the Mortgage Subscribers were seemingly accepted as part of the Community and permitted on the land where they expended money in establishing dwellings. The best which can be discerned from these informal and casual dealings is that the parties had a common intention that if the Mortgage Subscribers paid their money to the Company they would become members of the Community and have an interest in the Property which was commensurate with that of the existing members. That arrangement was put into effect, the money paid and, for all outward appearances, the Mortgage Subscribers became members of the Community. In general terms it can be said that the detriment suffered by each was the amount of the money they subscribed to the Company.

139 In circumstances such as these it might not be inappropriate to recognise the existence of a constructive trust of the type referred to in *Bannister v Bannister* [1948] 2 All ER 133 in respect of the previously mortgaged portion of the Property for the Mortgage Subscribers in proportion to the amounts which were contributed. That was because the joint endeavour between them and the Pre-Purchase Subscribers failed in circumstances where it was not intended that the benefit of one member's subscription be enjoyed by the others. Alternatively, it was because the common intention of the parties was that all were to have an interest in the Property and it would be inequitable to deny any member a beneficial interest. (The principles underpinning these two types of constructive trust are discussed later in these reasons.)

A constructive trust to protect an interest in a contract to assign a beneficial interest

140 Alternatively, the circumstances may be characterised as one of an agreement between the Company or the existing members and the Mortgage Subscribers such that the Court will recognise a constructive trust of an interest in favour of the assignee of a beneficial interest in the Property for which consideration was paid. First, it is well established that the vendor of an interest in land holds the interest sold on a constructive trust once the contract has been entered into: *Howard v Miller* [1915] AC 318; *Central Trust and Safe Deposit Co v Snider* [1916] 1 AC 266 and *Brown v Heffer* (1967) 116 CLR 344; *Carson v Wood* (1994) 34

NSWLR 9, 15; and once the purchase price is paid the equitable interest is no longer contingent. In this case the Company and/or the Pre-Purchase Subscribers and the Mortgage Subscribers agreed that an interest in land would be transferred to the latter who paid the subscription price. The money was paid and, indeed, the agreement was further performed by the Company allowing the Mortgage Subscribers access to and an entitlement to live on the Property. In the ordinary course, the Court would recognise the Company holding the land subject to a constructive trust for the purchaser in respect of the assigned interest. If, in substance, the Pre-Purchase Subscribers were the assignor of the interest, they would hold their equitable interests on a sub-trust for the Mortgage Subscribers. The absence of writing will not impede the recognition and enforcement of a constructive trust: *Ford and Lee, Principles of the Law of Trusts*, 2019 loose leaf edition, para [24.4220]. The difficulty here is that the interest intended to be sold or assigned was an interest in the unit trust which did not materialise, so there was no such interest which might be held upon the constructive trust.

The position of Mr Alderman and Ms Dresdon: the Post-Discharge Subscribers

141 It was suggested that the claims of the Post-Discharge Subscribers (Mr Alderman and Ms Dresdon) were problematic because they paid money after the purchase price was paid and the mortgage discharged. Although no resulting trust could then arise, there could be potential for the recognition of some other proprietary interest held by them. Assuming the first hypothesis had so far been accepted, given the Company and relevant members of the Community invited and procured their involvement (with at least the tacit consent of the Pre-Purchase and Mortgage Subscribers), conscience would not permit otherwise.

142 The analysis would proceed that the members (the Pre-Purchase and Mortgage Subscribers), who held the beneficial interest subject to the hypothesised resulting (or constructive) trust(s) considered above, having encouraged and intended the addition of new subscribers, acting through the Company, its director and certain other members, could not resile from the representation that the Post-Discharge Subscribers would have an interest in the land of the same kind. A constructive trust in proportion to Mr Alderman's and Ms Dresdon's contributions would then be recognised, it being irrelevant whether the underlying foundation were in equitable proprietary estoppel, unconscionable conduct or unjust enrichment.

143 The precise manner in which the constructive trust is conceptualised would not necessarily matter in the circumstances of this case. It would possibly be more satisfactory to recognise that the circumstances gave rise to a "common intention constructive trust" between the

existing members on the one hand and Mr Alderman and Ms Dresdon on the other, being of the type referred to in *Imam Ali Islamic Centre*. Indeed, as between those two groups the trust might be of the type referred to by Deane J in *Muschinski v Dodds*.

144 The constructive trust so recognised may well be of the existing members' beneficial interests in favour of Mr Alderman and Ms Dresdon: see the dissenting speeches of Lord Radcliffe and Lord Cohen in *Oughtred v Inland Revenue Commissioners* [1960] AC 206; [1958] Ch 383. Or, the effect of the Company's dealings with Mr Alderman and Ms Dresdon maybe that it, on behalf of the existing members, assigned for value a proportionate share of their beneficial interest such that equity regards that as a complete and valid transfer of the interest regardless of the non-compliance with the Statute of Frauds: *Halloran v Minister Administering National Parks and Wildlife Act* 1974 (2006) 229 CLR 545, [72]-[73].

145 The same cannot be said in relation to the amounts paid by them and, apparently, Mr and Mrs Fagan in relation to "The Mount Burrell Commercial Precinct". Although it is likely that a similar trust relationship arises in relation to that project, that issue is not before the Court and it is not necessary to determine it. There was no suggestion that the subscribers would secure an interest in the Property if they paid these amounts and these payments were not used for the benefit of the Company or to acquire the Property. It suffices to say that if a payment was not made to advance the common intention relating to the promotion of the Community no proprietary interest in the land on which it was situated could arise.

146 Here Mr Alderman and Ms Dresdon contributed $160,000 to Wollumbin Horizons for the purposes of making improvements to and maintaining the Property. They did so on the basis of the representations made to them by the Company as part of the joint relationship, venture or endeavour contemplated by the members of the Community. Importantly, it was represented that if they did they would have an interest in the Property as did the other members of the Community. That joint endeavour has failed. The unit trust which was sought to be established also failed as did the project generally. In the latter respect it failed because the Company omitted to ensure that work done on the Property complied with the local town planning requirements. In that respect the endeavour was doomed from the beginning. The necessary result might well be that a constructive trust over the land should be recognised as existing in favour of Mr Alderman and Ms Dresdon in respect of the $160,000 paid to Wollumbin Horizons. Again, it is irrelevant whether the underlying foundation of that trust is equitable proprietary estoppel, unconscionable conduct or unjust

enrichment. The principles underpinning this type of constructive trust are discussed in detail below.

Conclusion as to the existence of sequential resulting and constructive trusts

147 It is fair to say the result of the lack of care and diligence by Mr Darwin, his associates and the Company in the manner in which they went about establishing the Community is that the discernment of the respective beneficial interests is attended with great difficulty. It is possible that the confused factual scenarios which existed might permit of more than one legal characterisation of the nature of the trusts which arose.

148 The difficulty with the "sequential constructive and resulting trust" analysis is that the existence of a resulting trust in favour of the initial subscribers as suggested is inconsistent with the actual intention of the parties. The parties intended a transaction in which they would hold an interest on trust and that the interest would be by way of a unit trust. That is not consistent with the presumed intention that their proportionate contributions to the purchase price were to be reflective of the interest which they had in the Property. As mentioned, this would appear to be fatal to the resulting trust analysis and, it would follow, the Pre-Purchase (and potentially Mortgage) Subscribers would not have the relevant beneficial interest to hold on constructive trust for the later subscribers. In addition, the underlying tracing exercise required for the imposition of a resulting trust is problematic in this case where the Pre-Purchase Subscribers' funds were not used as the parties contemplated and were in part used to discharge the mortgage rather than the purchase price. The first hypothesis, which as a result might involve some jurisprudential gymnastics, should not be preferred.

The second hypothesis: a joint endeavour or common intention constructive trust encompassing all subscribers

149 Where people have made contributions on the basis and for the purpose of furthering a joint endeavour, the substratum of the joint endeavour is removed prematurely without attributable blame, and the benefit of the contributions by one party would otherwise be enjoyed by another where that was not specifically intended or specially provided, equity will not permit that other party to assert or retain the title to the extent it would be unconscionable for them to do so: *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 147-8 adopting *Muschinski v Dodds* (1985) 160 CLR 583 per Deane J.

The joint endeavour

150 The membership of the Community, as it was constituted from time to time, pursued a joint endeavour of establishing a commune on the Property. They sought to acquire the land (eventually free of encumbrances), improve it and make it suitable as a place to live together, sharing common responsibility for the land. It was, at least, the pursuit of a quasi-domestic relationship between the members. They believed, with the encouragement of Mr Darwin and the Company, that they would have an interest in the land and some form of collective control over the Company, as a vehicle for legal ownership of the Property.

151 Although members joined at different times, that was itself an integral part of the joint endeavour from the start, and the new members on each occasion pursued the same endeavour. While some disputes arose between some members at times, and some sought to extricate themselves from the arrangements, in the relevant, broader sense their overall purpose continued. Campbell J in *West v Mead* at [59] said of particular parties that "the scope of the joint endeavour they are engaged in might change from time to time." Although that was not in the context of the membership of the endeavour changing *per se*, the addition of members (eg children) is not out of contemplation: see eg *Stavrianakos v Western Australia* [2016] WASC 64, [102]ff, [309]. There is no reason in principle to restrict the constructive trust doctrine to cases where a common intention remains constant throughout a relationship, given any trust arises only after the endeavour's failure: *West v Mead*, [84]; cf the observations of Lord Hoffman in the course of argument in *Stack v Dowden* [2007] 2 AC 432, as referred to by Baroness Hale at [62]. A failed commune giving rise to a joint endeavour constructive trust has been contemplated before: *Widmer v Imagination Enterprises Pty Ltd* (unreported, Supreme Court of Western Australia, Bredmeyer M, CIV 1126 of 1999, 9 April 1999).

Failure without attributable blame

152 Although, with hindsight, perhaps the Community's concept was always doomed to fail, the members were not aware of that. They were also not aware that the legal structure underpinning the Community had not been effectively put in place. The endeavour was a sustainable community founded upon a substratum of solid legal and physical structures, including the Company and the Property. With the insolvency of the Company, necessitating the sale of the Property, the joint endeavour (or common purpose or intention) of the

subscribers failed, its substratum taken away. It brought to a premature end the intended community in which all those to be members were to participate and share interests.

153 Deane J referred to the absence of "attributable blame" as being the cause of the failure of the joint endeavour. In *Bennett v Horgan* (unreported, Supreme Court of New South Wales, Bryson J, 4056 of 1991, 3 June 1994), Bryson J (whose comments have been followed in subsequent cases: see *Dean v Aylward* [2017] NSWSC 972, [48]) identified the meaning of that expression as follows:

> The concept of attributable blame must be understood and applied with some tolerance; in my view it does not call for a judgment attributing blame among members of a family for the continuing relationship becoming intolerable, unless perhaps in particularly gross cases. Such judgment would be difficult and unreliable, as it is rare indeed that something or other which could be said to be a ground for blame cannot be identified and laid to the charge of each of the persons concerned. Leaving gross cases involving criminality or similarly reprehensible behaviour on one side, it should usually be understood, in my opinion, that where personal relationships deteriorate and the sharing of a dwelling becomes intolerable to some or all of those concerned, there is, within the meaning of Deane J's expressions, no attributable blame and the case is one for an equitable adjustment.

154 Although personal relationships here did deteriorate, attempting to attribute blame as amongst the many failings of the many involved would be unproductive, to say the least. To the extent blame might be attributed to Mr Darwin or his associates, that could only prejudice their interests, and not those of the subscribers generally.

Unconscionable assertion or retention of title by another

155 It was not intended by the members that their subscriptions would be enjoyed by the Company in the circumstances of failure. The Company, variously agent (despite the content of the ineffective unit trust deed), inducer and promoter of and to the members, knew this and knew that no benefit or right was intended to arise for it out of the trust structure it failed to establish under the control of the members as promised. The Company was an active party in relation to the endeavour, so far as that be required.

156 Nor did the members specifically intend or specially provide that other members would enjoy the benefits of their contributions, were the Community to fail prematurely. Whilst it was intended that the interests be shared equally once the Community was fully established and operating under the unit trust as envisaged, that stage was never reached (as in eg *Muschinski v Dodds*). There is nothing in the material contemplating that the subscriptions of one party would benefit the others if the Community was not properly established. Indeed, those who

withdrew at various stages in its establishment received refunds commensurate with the different contributions they had made, rather than some equalised or adjusted amount.

157 Although the constructive trust is imposed irrespective of intention, as Campbell J pointed out in *West v Mead* at 24,444 [62], the intention of the parties as to the use to which contributions are made and the entitlements arising from the pursuit of the joint endeavour support the conclusion that the assertion of inconsistent beneficial interests is unconscionable:

> Even so, that is not to say that the intention of the parties has no role to play in whether a *Baumgartner* constructive trust should be held to exist. Part of the justification for imposing the *Baumgartner* constructive trust is that the parties have jointly been building up assets, on the basis that those assets will be available for the joint endeavour in future. Part of the reason why it can be unconscionable to let the legal title lie where it falls, if the relationship fails, is that each knew that the other was contributing to a common pool on the basis that the pool, and assets acquired from it, would be used for their ongoing common benefit. It is unconscionable for the party who ends up, at the end of the relationship, with a disproportionate share of the assets which were built up during the relationship, to keep those assets when he or she knew that that was the basis on which the assets were being built up.

158 In *West v Mead*, Campbell J (at 24,450 [84]) held that a constructive trust can only arise once there has been a failure of the substratum of the joint endeavour and there has been an assertion of rights acquired in the course of the joint relationship in a way which is unconscionable. That said, an assertion may be no more than a failure to acknowledge that the beneficial interests in property are not commensurate with the legal interests which are held as part of a joint endeavour: see eg "assert or retain" in *Muschinski v Dodds* at 620 per Deane J. Here, on the administration of the Company and its subsequent winding up, it sought to use the Property in respect of which it held a legal interest for the purposes of meeting its debts. That, as between the Company and the beneficiaries, is a sufficient assertion of title. Alternatively, as between the members the assertion of some of them that their interests prevail over others would also be a sufficient unconscionable assertion of title to found a constructive trust of the type identified in *Baumgartner*.

159 It was argued that a difficulty in the failed joint endeavour constructive trust analysis arose because the several members of the Community joined and became part of the joint relationship or endeavour at different times. It was suggested that this would give rise to different beneficial interests. Indeed, the Pre-Purchase Subscribers suggested their interests arose under a resulting trust and took priority. However, the better analysis is that the relevant constructive trust arose after all relevant persons became members of the

Community, at least in the sense that they subscribed their funds, and the substratum of the joint endeavour was removed on the Company's administration.

Are other orders capable of doing full justice?

160 Prior to making a declaration of constructive trust, courts must consider whether other orders are capable of doing full justice: *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 45 [128]; or if some other remedy is not 'suitable': *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 172 [200]; or 'appropriate': *Giumelli v Giumelli* (1999) 196 CLR 101, 113 [10]; or 'adequate' to 'quell the controversy': *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 585 [42]-[43]. A relevant concern in that respect is whether the legitimate claims of third parties might be adversely affected: *Muschinski v Dodds* at 623 per Deane J.

161 In exercising the Court's discretion in making the declaration, an unusual aspect of this case is that the proceeding is not *inter partes*, but rather brought by the liquidator on behalf of the Company (and its creditors). The most substantial apparently legitimate third party creditor, the Tweed Shire Council, has elected not to attend or be joined in the proceeding. There is limited evidence before the Court in respect of the other proofs of debt, which are yet to be adjudicated upon. However, incomplete evidence does not prevent the Court from taking these matters into account: *John Alexander's Clubs* at 45 [127].

162 The subscribers were always intended to hold the beneficial interest in the Property (the only substantial asset of the Company). Creditors in their dealings with the Company in its own name and on its own behalf would not have priority over the subscribers' interests had the unit trust been established. If creditors had sought to deal with the Company as trustee of the unit trust, they apparently did not seek to confirm the status of the trust, which, as is clear from these reasons, had entirely failed to take effect. No creditor appears to have obtained security for their debt, which could have been sought in circumstances when dealing with a proprietary company without any trading activity. On the other hand, the subscribers' interests were always to be proprietary in nature, and contributions were expressly made on that basis via accounts held on express trusts.

163 Given the basis on which a constructive trust arises, and as there is no evidence that the value of the Property has substantially increased as to suggest an equitable charge would be a more suitable remedy, there is no other order capable of doing full justice in the liquidation which might otherwise be more appropriately made, taking into account the facts of the present

matter and the nature of the interests advanced. That some creditors (and indeed the subscribers) will not recover their full interests is an unfortunate but not uncommon consequence of the financial mismanagement of a company. Whether such creditors might have rights (or derivative rights) against the managers responsible for the Company is not a matter for these reasons to resolve.

164 In the circumstances where the Company was knowingly used as the vehicle to pursue the joint endeavour, the court will recognise that it holds the Property on constructive trust for the subscribers in proportion to their respective contributions, as from the date of the Company's entry into administration. It would be unconscionable for the Company to assert otherwise. Similarly, it was not ever the intention of the members that the interests of any of them or any group of them were to prevail over others depending upon the time when they joined the Community. No member intended that others would enjoy the benefit of their subscription if the joint endeavour failed, and it is unconscionable for the others to assert it.

165 The relevant apportionment of interests as between the Community members is considered below.

An alternative framework: the common intention constructive trust

166 It is apparent that the unconscionable denial of a proprietary interest on the failure of the substratum of a joint endeavour is not the only foundation of a constructive trust. Courts have been prepared to recognise the existence of a constructive trust where the parties intended that their activities confer a beneficial interest on themselves in relation to property and, in reliance on that intention, they have acted to their detriment and the circumstances are such that it would be unjust to deny the person who acted to their detriment a beneficial interest in property. In *Imam Ali Islamic Centre*, McMillan J identified the relevant principles in the following manner:

> [402] The second class of constructive trust is a common intention constructive trust, which is distinct from the joint venture constructive trust. The court will construe a common intention constructive trust where:
>
> (a) there is an actual or inferred common intention of the parties as to their beneficial interest in a property;
>
> (b) there has been detrimental reliance on that common intention by the claimant; and
>
> (c) it would be an equitable fraud on the claimant to deny his or her interest in the property.

> The onus of proving such a trust lies on the party asserting the beneficial interest against the legal owner.
>
> [403] The parties' intentions can be found or inferred from the party's contemporaneous words and conduct, also having regard to the surrounding circumstances and context in which they were uttered or performed. The relevant intention may arise after the property has been acquired. The intention to be established need not designate a specific share of the property; it is sufficient that the claimant should have a beneficial interest.
>
> [404] The cases considering this form of constructive trust have commonly concerned persons in a domestic relationship, but the principle can be applied to disputes between parties to a commercial relationship.
>
> [405] A common intention constructive trusts creates substantive rights and is not merely a remedy that arises when a court makes a declaration to that effect. The trust will generally take effect from the moment at which the conduct giving rise to its imposition occurs. The interest created may, however, be deferred in accordance with principles governing priority between competing equitable interests.
>
> (citations omitted)

167 After noting some disquiet about the doctrinal origins of the common intention constructive trust, her Honour recognised (at [406]) that it is now accepted as having a distinctive role to play, albeit not exclusively, where the formalities for a contract or express written trust have not been satisfied and the other paths to resolution of the matter are not available or satisfied. It is not necessary in these reasons to consider the question of whether the identified "common intention constructive trust" is merely a sub-category or variant of the type of constructive trust referred to by Deane J in *Muschinski v Dodds*, although there are arguments which might support that conclusion.

168 The category of cases where a common intention constructive trust arises are not closed although they are often recognised as arising as between spouses or persons in personal relationships. In *Silvia (Trustee) v Williams, in the matter of Williams (Bankrupt)* [2018] FCA 189, the Full Court of this Court (Perram, Barker and Derrington JJ) said:

> 14 The categories of case in which this may occur are not closed but one common example is where a spouse or partner makes a financial contribution towards the cost of acquiring, improving or maintaining a property held in the other's name. In such cases, it is accepted that the party asserting the existence of the trust must prove, first, that the spouses held a common intention that they would own the property together; and, secondly, that the party asserting the trust acted upon that common intention by making contributions or other action to their detriment*: Green v Green* (1989) 17 NSWLR 343 ('*Green v Green'*) at 354-355 per Gleeson CJ (Priestly JA agreeing at 371). The contributions to the matrimonial home may be both direct or indirect (*Gissing v Gissing* [1971] AC 886 ('*Gissing v Gissing'*) at 908; *Green v Green* at 354) and may include not only the costs of acquisition, but also the costs of any improvements or costs relating to maintenance (*Green v Green* at 353). That said, the mere fact of the relationship combined with express or implied

> undertakings to provide support and accommodation will not suffice to establish the trust.

169 The nature of this type of trust was explained in *Munro v Munro* [2018] VSC 747 at [88] where Derham AsJ explained:

> [88] So far as a constructive trust may be raised, although the High Court of Australia has authoritatively stated that the basis of constructive trusteeship in cases of contributions to property or a relationship rests in unconscionable conduct, Australian courts continue to entertain arguments, usually as an alternative to the argument based on unconscionable conduct, based on the previous approach of imposing a constructive trust according to the actual or inferred (but not imputed) common intention of the parties. The relevant common intention may be derived from the evidence of express agreement or the making of admissions, or it can be inferred from, for example, the making of contributions to the cost of property, or meeting expenses in maintaining it. The latter highlights that a common intention constructive trust may arise from an agreement or common intention arising after acquisition of the relevant property. (footnotes omitted)

170 There appears to be one important difference between the common intention constructive trust and the failed joint endeavour constructive trust which concerns the occasion when the trust comes into existence. In *West v Mead*, Campbell J identified that the latter only arises on the collapse of the substratum of the joint endeavour and an unconscionable assertion of rights with respect to the property acquired in the course of the joint relationship. It may not be necessary in the case of a common intention constructive trust that any unconscionable assertion of title need occur. The foundation for equitable intervention in relation to that type of trust is the suffering of detrimental reliance by the party asserting the interest. Once that has occurred there is no reason why a court should not recognise the vesting of the beneficial interest in the asset or assets in question. In any event, this is not the occasion on which that interesting issue needs be determined.

171 Taken in isolation, the circumstances of the contributions by the Mortgage and Post-Discharge Subscribers would appear sufficient to recognise a common intention constructive trust in their favour. That is, there was a clear common intention between the Pre-Purchase Subscribers and the Company on the one hand, and the Mortgage and Post-Discharge Subscribers on the other, to ensure that the latter would acquire an interest in the Property if they subscribed and became Community members. The Mortgage Subscribers paid funds which were sufficient to discharge the mortgage and they became members of the Community. Some of them expended money on taking up residence on the Property. Sometime later Mr Alderman and Ms Dresdon were also induced to become members. The common intention of the then existing community members, the Company and Mr Alderman

and Ms Dresdon was that if the latter contributed their money they would also become members and acquire an interest in the land. If there were not a direct assignment of a beneficial interest to them, the Court would recognise the existence of a common intention constructive trust in their favour.

172 It follows that the imposition of a constructive trust may well be warranted as a result of the unconscionable conduct of the Company or the Pre-Purchase Subscribers seeking to exclude the Mortgage or Post-Discharge Subscribers. On one view the circumstances may fall within the principles identified by McMillan J in *Imam Ali Islamic Centre*.

173 Again, an alternative approach would be to consider the circumstances of the Community members at the point in time after the last persons joined. On the evidence it may be that the last members were Mr Alderman and Ms Dresdon although whether that is so or not is a matter for the liquidator to ascertain. In any event, at that point in time it can be recognised that all members had a common intention that they would each have a beneficial interest in the Property, that they had each acted upon that shared intention by making their subscription payment and, in some cases moving onto the land. As far as can be ascertained none had the intention of gifting any of their subscription to other members if the Community failed. In those circumstances it would be conduct amounting to an unconscientious denial of a member's interest in the Property for it to be suggested that they either did not hold an interest in the land or that their interest was other than proportionate to their contribution. It might therefore be identified that a common intention constructive trust arose at that point in time.

174 One difficulty with this analysis is that the members of the Community joined on different occasions. As a result it is difficult to assert against a person who was not a member at the relevant time that they had a common intention with those who had previously subscribed that if they joined the Community and paid their subscription they would acquire an interest in the land. True enough, the latterly joining members might be taken to be aware when they subscribed that this was the basis on which other members had joined and on which they were participating. However, it must be doubtful that this would satisfy the underlying rationale of the common intention constructive trust, being the existence of detrimental reliance on a common intention which has similarities with equitable proprietary estoppel. On the other hand, it is apparent that when a new member joined the Community they did so knowing that all other members had joined with the same common intention as to the

existence of their interest in the Property. In that way it is not entirely artificial to conclude that, by joining the Community, they were prepared to assume the obligations of membership which included acceptance of the rights of the existing members which arose as a consequence of the continuing common intention and the reliance by each member on it. On that basis they might be taken as having adopted as their own that continuing common intention as from the commencement of the Community. Again, this rationalisation of the legal relationships may involve some distortion of the accepted orthodoxy and necessitate the adoption of imputed, rather than actual, intentions.

175 A further difficulty with the analysis is that the common intention constructive trust is seen as institutional rather than remedial in that it takes effect "from the moment at which the conduct giving rise to its imposition occurs": *Imam Ali Islamic Centre* [405]. That would suggest that the trust exists from that point in time when the party claiming an interest has acted to their detriment on the faith of the common intention as to the acquisition of a beneficial interest. That would seem to be inimical to the identification of an ambulatory constructive trust which expands with the joining of each new Community member.

176 These concerns render it difficult to identify the existence of the same common intention constructive trust in respect of the Property from the time of its acquisition.

177 It ought to be observed that whilst it may have been that one of the Pre-Purchase Subscribers claimed that they did not believe that further persons were to have any interest in the Property, such an assertion is contrary to the overwhelming evidence as to the basis on which the Community was established and that claim should be rejected. It was also contrary to the events which occurred of which there was not complaint. Mr Darwin made it clear from the beginning that he would seek funds from additional community members to ensure that the purchase price was paid and that money was available for capital improvements and maintenance.

A preference for the failed joint endeavour constructive trust analysis

178 Whilst some not unreasonable arguments exist in support of the conclusion that a common intention constructive trust existed in relation to the interests of the Community members from time to time, the circumstances do not sit comfortably with the underlying rationale for trusts of that nature. The circumstances of this matter, particularly at that point in time when the last member joined the Community, more accurately indicate the existence of that form of constructive trust which arises upon the failure of a joint endeavour.

No resulting trust

179 It follows that the submissions of the liquidator and some defendants to the effect that the Property was held on a resulting trust should be rejected. The correct interpretation is that it was held on a constructive trust by the Company for the subscribers who advanced money to become members of the Community. That trust arose on the failure of the joint endeavour, best identified at the date the Company entered administration.

The relevant direction

180 It follows that the relevant direction which ought to be given is:

> The plaintiff is justified in treating real property situated at 3222 Kyogle Road, Mount Burrell in New South Wales, being Lot 20 in Deposited Plan 755714A and 755714B and Lot 2 in Deposited Plan 1148316 (being all the land in folio identifiers 20/755714A, 20/755714B and 2/1148316) (the Property) as being held by the Company, as bare trustee, subject to any charge or lien that the Company has over the Property to secure payment of any debts properly incurred by the Company as trustee, pursuant to a constructive trust (the Trust) for those parties who subscribed money for the purposes of becoming members of the Bhula Bhula Community.

What are the interests of the beneficiaries under the constructive trust?

181 Given the above, the next question is to identify the relative proportionate interests of the community members in the land.

182 It must be kept in mind that, in general terms, the imposition of a constructive trust is a remedial solution arising when a party seeks to use their legal right to defeat the substance of a transaction or the actual or presumed intention of a transaction: *Muschinski v Dodds* (1985) 160 CLR 583, 613-614; and its remedial character permits it to be moulded to reflect the equities and the circumstances of a particular case: *Bryson v Bryant* (1992) 29 NSWLR 188, 218. That is not a significant issue in the present case where the extent of the detriment suffered by subscribers was, at least, the amount of their monetary contribution. Whilst in constructive trust cases the court is entitled to take a broad brush approach to determining the respective shares of the competing parties: *Drake v Whipp* [1996] 1 FLR 826 per Peter Gibson LJ; *Jones v Kernott* [2010] 1 WLR 2401, 2405-2406 [10]-[11]; here, the apportioning of interests according to the respective financial contributions is the most appropriate. That is particularly so when the trust is imposed to prevent the enjoyment of the contributions of others to the venture. Such a conclusion logically coheres with the notion that each member subscribed to the joint endeavour a certain amount of money which they would not have done in the absence of the understanding that they would become entitled to an interest in the

Property. In *Baumgartner v Baumgartner*, Mason CJ, Wilson and Deane JJ said at 147-148 in relation to the identification of the interest of beneficiaries of constructive trusts specified by Deane J in *Muschinski v Dodds*:

> Deane J (with whom Mason J agreed) reached this result by applying the general equitable principle which restores to a party contributions which he or she has made to a joint endeavour which fails when the contributions have been made in circumstances in which it was not intended that the other party should enjoy them.

183 The apportionment of interests consistently with the respective financial contributions is also consistent with the assessment of detriment sustained by each of the Community members. Where the common intention is that each party makes a financial contribution to the Community in return for which they will obtain an interest in the land and those contributions are made in unequal amounts, the imposition of interests commensurate with the proportionate contribution is appropriate. In *Sivritas v Sivritas* [2008] VSC 374 at [132] Kyrou J identified the matters which ought to influence the assessment of the respective proprietary interests:

> [132] In determining the scope of any *Muschinski v Dodds* constructive trust, a court can take into account direct financial contributions to the purchase price of the property and incidental costs such as stamp duty, registration fees, solicitors' fees and bank fees. However, a court is not limited to such expenditure. It can also take into account the pooling of financial resources, other financial contributions even in the absence of pooling, contributions of labour, and non-financial contributions or contributions in kind such as homemaking and parenting contributions. Further, the inquiry into whether the assertion by a party of his or her legal rights would be unconscionable can encompass events that occurred after the property was initially acquired. Expenditure on repairs and renovations of the property by a person asserting a constructive trust in respect of the property, where the expenditure is accepted by the legal owner of the property in the knowledge that it would improve the home and add to its value, can be considered as a contribution in quantifying the first person's equitable interest under the constructive trust.

184 These authorities should apply in the present matter such that the proceeds of the sale of the land, after the deductions referred to subsequently in these reasons, should be divided amongst those who subscribed money to become members of the Community and whose money was used or was intended to be used in relation to the purchase of the Property or its maintenance or improvement. That is, amongst those who joined in the joint endeavour. The division of those funds is to occur in proportion to the amount which each subscriber's payment bears to the total of the funds paid by the members as subscriptions to become members of the Community. The result of this conclusion is that whilst the trust is constructive, it is resulting in effect.

185 In relation to the beneficial interests of the members the following direction should be given to the liquidator:

> The plaintiff is justified in treating the beneficiaries of the Trust as those persons whom the plaintiff identifies as having subscribed to become members of the Bhula Bhula Community where the funds so subscribed were or were intended to be used by the subscriber in relation to the costs of acquisition of the Property, the purchase price of the Property, the discharge of the mortgage over the Property, or for the maintenance or improvement of the Property, in proportions calculated rateably to the amount of money they each contributed to the total funds subscribed for those purposes.

Money returned to members

186 In accordance with the shambolic manner in the Community was run it appears that some members were returned part of their subscriptions from time to time. That will, no doubt, affect the extent of the beneficial interest of a member who has received any of their funds back. That is something which the liquidator will need to take into account when ascertaining the proportionate beneficial interest of each member.

Conclusion on trust

187 It follows that the Company holds the Property on a constructive trust for the benefit of those who subscribed money for an interest in the Community by way of payment for a unit in the unit trust where the Community and unit trust have failed. Their beneficial interests are in the same proportion as the amount of their subscription bears to the total amount of subscriptions.

Resolution of the liquidator's claim

188 The identification of the interests in the land and the trust on which the land is held is the first and most significant step in answering the liquidator's questions. The next step is to identify the manner in which the Property is to be dealt with by the liquidator.

Sale of the Property

189 The liquidator seeks an order that he be entitled to sell the Property. There is no reason why that should not occur. The joint endeavour of the Community members failed and it cannot be lawfully pursued. Moreover, the entity which held the legal title to the land is insolvent and is being wound up. It is likely to have some claim to exoneration or reimbursement in relation to expenses of the trust. These are considered below. Further, some costs of the liquidation will necessarily need to be discharged from the trust assets given that resolution of issues surrounding the trust has been a significant part of the winding up.

190 It is to be recognised that one or two Community members asked the Court that the land be vested in a new trustee so that the original plan of a Community might be pursued. Apart from the present illegality that is not the purpose of the constructive trust which is to return the corpus of the trust to the beneficiaries. Given that not all Community members wished to have the original purpose pursued and no one was prepared to discharge the debts which need to be discharged from the trust, no valid reason existed for not ordering that the liquidator sell the Property.

191 The liquidator ought to be given a direction that:

> The plaintiff is justified in proceeding to market for sale and selling the Property in the way he considers appropriate.

The appointment of the liquidator as receiver of the Property

192 The liquidator also seeks an order that he be appointed as the receiver of the property of the trust of which the company is trustee. Such an order is common in cases where the company being wound up is also the trustee of a trust and where the assets of the trust are subject to the rights of exoneration or recoupment of the company and the costs of the winding up.

193 The liquidator seeks his appointment as receiver because, as he submits, there is uncertainty in the authorities as to whether a liquidator of a corporate trustee had the power to sell trust assets to enforce its right of indemnity. He also submits the appointment of the liquidator as receiver will facilitate the expeditious sale of the trust assets and the winding up of the company. The necessity for the making of orders such as these was recognised by Allsop CJ in *Killarnee* (at [44] and [87]-[91]) where his Honour recognised that although a trustee is entitled to exercise its right of indemnity to enforce the right of exoneration or recoupment without a court order, where property is not required to be sold, the lien does not confer a power of sale and if such sale is necessary, "a court order or the appointment of a receiver to sell is required."

194 In the present case, it would appear to be more than arguable that the liquidator is entitled, in the name of the Company, to exercise the power of sale with respect to the Property. However, it is appropriate to put the matter beyond all doubt and orders should be made to appoint the liquidator as the receiver of the assets of the trust with sufficient powers to effect a sale of the Property.

195 The following orders should be made in relation to the appointment of the liquidator as receiver:

> The plaintiff is appointed receiver, without security, over the Property, pursuant to s 57 of the *Federal Court of Australia Act 1976* (Cth).
>
> The plaintiff be so appointed with the powers provided by s 420 of the *Corporations Act 2001* (Cth) as if the reference therein to "the corporation" were to "the Trust" together with the powers that a liquidator has in respect of property of a company (in its role as legal owner and trustee) pursuant to s 477 of that Act.
>
> The need for the plaintiff, as receiver, to file a guarantee under rr 14.21 and 14.22 of the *Federal Court Rules 2011* (Cth) is dispensed with.

Caveat removal

196 On 26 October 2016, Ms Melissa Hirsch lodged a caveat on the title to the Property. In that caveat she claimed an interest as being an "equitable interest in the land pursuant to an interest of a beneficiary under a trust and / or an interest of a unit holder in a unit trust". In these proceedings Ms Hirsch's claim has been vindicated to the extent that her interest in the land is recognised in the orders made herein. However, her interest is subject to the Company's rights of exoneration and recoupment. It is also now subject to the entitlement of the liquidator to sell the property, discharge the relevant debts and impositions on the Property and its proceeds.

197 In the circumstances it is appropriate to order that Ms Hirsch remove the caveat so as to allow the sale of the Property to proceed and for the net proceeds to be distributed to those beneficially entitled, including her. The appropriate order is:

> Pursuant to s 74MA of the *Real Property Act 1900* (NSW), Melissa Hirsch, within 14 days of the date of this order, withdraw the caveat (dealing number AM352133M) from the title of the Property.

Distribution of the trust assets

198 The liquidator asserted that the real question on the application concerned the manner in which the assets of the constructive trust could be distributed. This necessarily followed from a determination as to the beneficial interests in the Property. He sought an order that that he would be justified in distributing the assets in accordance with the order of priority in ss 555 and 556 of the *Corporations Act*: *Jones (Liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* (2018)] 354 ALR 436 (*Killarnee*) and *Re Amerind Pty Ltd; Commonwealth v Byrnes and Hewitt* (2018) 54 VR 230, [276] and [281]. That latter decision was affirmed on appeal to the High Court by reasons

published yesterday: *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* [2019] HCA 20.

199 It can be accepted that the liquidator is required to apply the property of the Company in accordance with the law which includes the interpretation of the provisions of the *Corporations Act* by the courts. However, the real issue involves the extent to which the Company is entitled to any rights of exoneration or recoupment from the assets of the trust.

Limited obligations as bare trustee

200 The liquidator now accepts that the capacity on which the Company held the Property in trust was limited to that of a "bare trustee". That acceptance is appropriate in the circumstances where it has been determined that the trust was not the unit trust which had been intended but a trust imposed by law as a result of the nature of the transactions between the parties. In consequence of that, the trustee had duties limited to possessing and maintaining the Property, until such time as those beneficiaries required it to be conveyed. The trustee was required to protect the property and vindicate the rights attaching to it: *CGU Insurance Limited v One.Tel Limited (In Liquidation)* (2010) 242 CLR 174, 182-183 [36]. So much is true both prior to and after the failed joint endeavour constructive trust arose on the entry into administration of the Company. After that time, the Property was held on the bare constructive trust as declared here. Prior to that time, although it was not argued in these terms, the Company did not hold the Property in its own right, but rather subject to the beneficial interests arising from the payments of funds (with its knowledge) from the various express trusts manifested in the GAF Account and Wall & Co trust accounts.

201 The liquidator asserts that the Company is entitled to be indemnified out of the assets of the trust in respect of those debts the "debts necessarily relating to liabilities incurred by the Company as trustee to maintain and safeguard the Property". To that extent the Company retains an equitable lien to enforce the rights of indemnity: see generally *Lane (trustee), in the matter of Lee (bankrupt) v Deputy Commissioner of Taxation* [2017] 253 FCR 46, [35]-[102] (*Lane*); *Killarnee* [30]-[42] per Allsop CJ.

202 There was no real dispute that, *prima facie*, the Company is entitled to discharge from the assets of the trust the debts which arose out of the trusteeship. As the actual trust on which the Property was held was not the purported unit trust which failed, the debts relating to that contemplated trust cannot be paid by use of the assets of the constructive trust. The liquidator

did not contest to the contrary and was content for any direction concerning the discharging of debts to be limited to those debts of the constructive trust.

203 In relation to this aspect of the matter the following declaration and directions ought to be made:

> It is declared that the Company has a right of indemnity from the assets of the Trust for Trust debts, being those debts properly incurred as trustee of a constructive trust.
>
> The plaintiff is justified in calling for proofs of Trust debts of the Company, being those debts properly incurred as a trustee of a constructive trust, and to have recourse to the assets of the Trust to satisfy those claims, as accepted.
>
> The plaintiff is justified in recovering the costs and expenses incurred by the Company and the plaintiff in realising the assets of the Trust, and otherwise dealing with the Trust, from the assets of the Trust.

Clear accounts rule

204 However, the trustee's right of indemnity from the assets of the trust is subject to the "clear accounts rule" to the effect that before the trustee can rely upon its right of indemnity it must make good any loss which it has caused to the trust: *RWG Management Ltd v Commissioner for Corporate Affairs (Vic)* [1984] VR 385; *Australian Securities and Investments Commission v Letten (No 17)* (2011) 286 ALR 346, [20].

205 As the facts in this matter reveal, those involved in the management and operation of the Company lacked the skill, knowledge or understanding to carry out the necessary tasks in any appropriate manner. The Company made no attempt to ascertain what its duties were nor did it appreciate that the unit trust had failed such that its obligations, duties and rights in relation to the Property were limited. It is not clear whether and to what extent the Company caused loss to the trust by reason of any breach of trust duty. To the extent to which such loss occurred its right to indemnity is reduced. That said, to the extent to which it incurred debts which are not payable from the trust funds, the incurring of such debts did not cause the trust loss.

206 It follows that the order allowing the liquidator to discharge debts properly incurred in the management of the trust (Trust debts) out of the estate is limited by the clear accounts rule.

Cost of liquidation and remuneration

207 The liquidator seeks an order that the costs of the winding up and his remuneration are payable from the proceeds of the sale of the Property as a trust asset. He submits that the

only assets which are available are the trust assets such that the net proceeds of sale should be available to meet the winding up costs.

208 A difficulty with such an order in this case is that the Company's business was not solely that of acting as the trustee of the trust. Here, the unit trust, which was to be the object of the Company's business, failed and the only trust which existed was the constructive trust. That trust did not require administration as the unit trust would have required. It is not to the point that Company was not aware that its only obligations were those of a bare trustee. The consequence of this is that several activities of the Company were outside of the scope of the actual trusteeship and many of the debts incurred were not trust debts. Necessarily, it follows that the winding up of the Company does not merely involve the administration of the Company as trustee. It involves the winding up of the Company apart from its role as trustee.

209 The liquidator submitted that he is "entitled to be paid his costs and expenses, whether for administering trust assets or for general liquidation work, because he is effectively carrying on the trustee's duty of managing the trust for the benefit of the trust or trusts". In support of that he relied upon the decision of Kennedy J in *Re Mackie Group Pty Ltd (in liq)* (2017) 122 ACSR 537, 545 -547, [51]-[67]. However, as that decision itself makes clear, the company in question had no other activities other than that of a trading trust. That being so, the general liquidation work was only consequential upon its activities as trustee and, on that foundation, the whole of the liquidation costs were to be paid from the assets of the trust.

210 Here, no global order can be made allowing the liquidator to recover all of the costs of the administration and of the winding up from the assets of the trust. An apportionment will necessarily be required to be undertaken to separate the costs of the administration and winding up relating to the trust from other costs. As the Company's activities extended beyond its conduct as a trustee it is inappropriate that the trust assets bear the burden of the whole of the costs of winding up. In this respect, orders concerning the assets available to meet the costs of winding up do not have their origin only under the *Corporations Act*. In *Lane* (at [154]-[194]) there was substantial consideration of the application of the principles in *Re Universal Distributing Co (in liq)* (1933) 48 CLR 171 and *Re Berkeley Applegate (Investment Consultants) Ltd (in liq)* [1989] Ch 32 concerning the entitlement of those engaged in winding up trustees to utilise trust assets for the purposes of discharging their costs, charges and remuneration. Those two cases had been carefully considered by

Finkelstein J in *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377 and, in *Lane*, his Honour's views were summarised as follows:

> His Honour noted that the principles in *Berkeley Applegate* and *Re Universal Distributing* required that attention be directed to identifying the entities for whose benefit the work by the liquidator was conducted. In that case, it was held that to the extent to which the work was done by the liquidator in what was, effectively, the administration of the trust, the costs, expenses and remuneration were to be paid out of the trust assets (at p 385). To the extent to which the work done was in the ordinary winding up of the company, referred to by his Honour as "general liquidation matters", it was to be paid for out of the assets beneficially owned by the company. Where the company in liquidation only acted as a trustee of the relevant trust, and the trust itself is insolvent, it might be that much of the work involved in "general liquidation matters" was necessary in the proper administration of the trust and, therefore, chargeable against the trust assets. On the other hand, where the insolvent trustee has only non-trust creditors but insufficient assets of its own to meet the costs, expenses and remuneration of a liquidator or bankruptcy trustee, it is difficult to identify any basis on which an order might be made permitting recourse to the trust assets or the right of exoneration to satisfy the shortfall.

211 The above principles are applicable in the present case and they permit the liquidator to have recourse to the trust assets for his costs and expenses of the liquidation and for recovery of his remuneration to the extent to which his work concerned the assets of the trust. The nature of the work for which such sums are recoverable are referred to, albeit not exclusively, at para [191] in *Lane.* Here, the administration of the trust was a part of the winding up of the Company such that a portion of the cost of the general liquidation matters should also be met out of the trust assets as identified by Finkelstein J.

212 Yesterday, the High Court delivered judgment in *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* [2019] HCA 20. There is some indication there (see [167]-[171] per Gordon J) that the liquidator's costs and expenses so far as they relate to the trust might be regarded as trust debts. Accepting that to be the case, the result would be the same and the liquidator is not entitled to charge the trust assets with the costs of general insolvency work which is not referable to the trust.

213 It is to be emphasised that the Court is not being asked in this application to make any determination of the reasonableness of the liquidator's costs and expenses or his remuneration. That matter can be raised and considered, if necessary, on another occasion.

214 As appears above, orders are made appointing the liquidator as the receiver of the Property for the purposes of realising it. He also seeks an order for the costs, expenses and remuneration as receiver relating to the sale of the Property. For the reasons referred to above, such an order is appropriate. That does not mean that the liquidator is paid twice for

undertaking the same work in different capacities. Such an order merely puts beyond doubt that he is entitled to recover his costs, expenses and remuneration relating to the sale of the Property.

215 Insofar as the liquidator has sought directions in relation to the recovery of the costs and expenses incurred in the administration and winding up of the following direction should be made:

> The plaintiff, in his capacity as administrator and liquidator of the Company and as receiver of the Property, is entitled to be paid from the proceeds of the sale of the Property:
>
> (a) his costs, expenses and remuneration to the extent to which they relate to work undertaken by the plaintiff in relation to the administration of the Trust including the work undertaken to render the Company's right of exoneration available to meet the claims of the Company's creditors, whose debts were incurred in the administration of the trust;
>
> (b) an amount in respect of his costs, expenses and remuneration relating to general insolvency matters, to the extent the costs, expenses and remuneration concern the administration of the Trust.

216 A declaration ought to be made as the liquidator's entitlement to a lien over the property of the trust in respect of his entitlement to be paid the identified costs, expenses and remuneration:

> It is declared that the plaintiff is entitled to a lien over the assets of the Trust in respect of his fees, expenses, and outlays incurred in his capacity as administrator and, subsequently, as liquidator of the Company to the extent allowed by the Court.

Costs

217 The liquidator seeks an order that his costs of this proceeding be paid from the proceeds of the sale of the Property. He also seeks an order that his costs be paid from those proceeds in accordance with the order of priority in s 556.

218 In the usual course, where a trustee acts reasonably and in good faith in the administration of a trust, it is entitled to look to the trust assets for reimbursement of any expenses incurred. Here, the liquidator, acting through the Company as trustee brought this application because there was uncertainty about the rights and interests of the various competing interests. The beneficiaries of the trust were not able to agree upon their respective proportions, or upon the orders which should be made in relation to the trust. In addition, those previously in control of the Company failed to conduct the trust as was required with the result that the

circumstances of the trust were confused and disorganised. That supports the appropriateness of the liquidator's conduct in bringing these proceedings.

219 Some of the defendants suggested that the liquidator should pay the costs of the action seemingly because the litigation was protracted. There is no substance in that submission. The liquidator's actions were entirely proper and by these proceedings he sought to have the rights of the parties to the Property determined as expeditiously as possible. If there were any delay or protraction it arose as a result of the conduct of a number of the defendants.

220 Although it is unfortunate to have to mention it, it is also relevant that a number of the Community members appeared to raise several scurrilous allegations about the manner in which the liquidator was engaging in his task of winding up the Company. None of them were established or even supported with admissible evidence. In such circumstances it was reasonable for the liquidator to seek the advice of the Court so as to put the issues raised beyond doubt.

221 In the result, the liquidator's costs of the proceedings ought to be paid from the proceeds of the sale of the Property and of any other trust property. It matters not whether they are to be regarded as a direct impost on the proceeds or merely the exercise of a right of exoneration: *Woodgate, in the matter of Bell Hire Services Pty Ltd (in liq)* [2016] FCA 1583, [24]; *Killarnee* (at [105]-[108]).

222 The appropriate order in relation to the payment of costs is:

> The plaintiff's costs of the proceeding (including reserved costs), calculated on a full indemnity basis, be paid out of the assets of the Trust and, to the extent not satisfied from the assets of the Trust, be costs in the liquidation.

223 The liquidator's right to indemnity from the trust assets in respect of costs should be secured by a declaration of a lien over the trust assets (ie the Property) for those costs. In this respect the order should be:

> It is declared that the plaintiff has a lien over the assets of the Trust for his costs of these proceedings.

224 Similarly, the costs of the third, fourth, fifth and sixth defendants ought to be paid out of the proceeds of sale. Their involvement through solicitors and counsel was necessary to determine the respective rights of the parties. In that respect the appropriate costs order ought to be:

> The third, fourth, fifth and sixth defendants' costs of the proceeding (including

reserved costs), calculated on a full indemnity basis, be paid out of the assets of the Trust.

225 Otherwise the other defendants appeared for themselves and any recoverable costs would be relatively minor. Their involvement in the action did not assist in the resolution of the issues and, to a not insignificant degree, it generally increased the complexity and length of the proceedings and of the final hearing.

I certify that the preceding two hundred and twenty-five (225) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Derrington.

Associate:

Dated: 20 June 2019

SCHEDULE OF PARTIES

QUD 32 of 2018

Defendants

Fourth Defendant:	MELISSA HIRSCH
Fifth Defendant:	STUART NEWMAN
Sixth Defendant:	NORMA GEELIN MOU
Seventh Defendant:	PHILLIP MORANDINI
Eighth Defendant:	DEAN MOONEY
Ninth Defendant:	CRAIG SCOTT